

No. 13562

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR and JONES STEVEDORING
CO., a Corporation,

Appellees.

Apostles on Appeal
In Two Volumes
Volume II
(Pages 360 to 736)

Appeal from the United States District Court for the
Northern District of California,
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Wednesday, March 19, 1952—2 o'Clock P.M.

The Court: Proceed.

Mr. Magana: Your Honor, to expedite the examination of the doctor, I have some X-rays that I have taken from libelant's Exhibit 1 and also libelant's Exhibit 3, together with some X-rays that were taken at the doctor's office or under the doctor's supervision.

Since there are a number of them, I was thinking in order to refer to them logically, may I at this time mark them, for example, 1-A, 1-B, and so on, depending on the order they come in?

The Court: If that is the usual procedure, the Clerk will conform to it. Is that all right, Mr. Clerk?

The Clerk: Yes, your Honor.

Mr. Magana: Thank you.

The Court: I depend a lot upon the Clerk in these matters.

Mr. Magana: The first X-ray, which was taken from libelant's Exhibit 3, may that be marked 3-A?

(Thereupon, X-rays previously admitted into evidence collectively as libelant's Exhibit 3, were marked libelant's Exhibits 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I and 3-J.)

(Thereupon, X-rays heretofore admitted into evidence [248] collectively as libelant's Exhibit 1 were marked libelant's Exhibits 1-A, 1-B, 1-C and 1-D.)

(X-rays were marked libelant's Exhibits 20 through 36, consecutively, and admitted into evidence.)

Mr. Magana: May I call Dr. Walker?

HARRY R. WALKER

called as a witness for the libelant; sworn.

The Clerk: State your full name and occupation to the Court.

A. Harry R. Walker.

Direct Examination

By Mr. Magana:

Q. Doctor, you are a physician and surgeon, licensed to practice here in this state, are you not?

A. Yes, I am.

Q. Would you briefly, but without any modesty, tell the Court your background for the purpose of judging your qualifications?

A. I graduated from the University of Louisville, Kentucky, School of Medicine, 1939. Had a rotating internship in Flower Fifth Avenue Hospital, New York City. I was assistant resident in surgery at Flower Fifth Avenue Hospital; Fellow in Orthopedic Surgery at Mayo Clinic, Rochester, Minnesota; residency at Crippled Children's Orthopedics at the Shrine Hospital in St. Louis. I spent six years in the Navy as an [249] orthopedist.

Q. Would you generally tell the Court what the field of orthopedics implies?

A. It is the study of the musculo-skeletal system, which means the study of bones, joints, nerves and skin.

Q. Are you on the staff of any hospitals in the Bay Area? A. I am, sir.

Q. What ones?

(Testimony of Harry R. Walker.)

A. Children's — East Bay Children's Hospital; Merritt Hospital; Providence Hospital; Peralta; Richmond Hospital, and the Alameda Hospital.

Q. All right. You, in effect, are the treating doctor, the man who has been following Mr. Luehr and treating him for his condition since July 28th, 1950, right? A. Yes, sir.

Q. And you have been——

The Court: Pardon me. 1950?

A. 1950.

Mr. Magana: 1950; yes, sir.

Q. That is correct, isn't it?

A. That is right, yes.

Q. He has been your patient since that time and to the present time; is that so?

A. That is correct, sir.

Q. We have already given the Court the background of the [250] times Mr. Luehr was in the hospital. Would you, briefly, without reference, for the present, to the X-rays, outline your observations of Mr. Luehr from the moment you first saw him? In other words, give the Court a bird's eye view of what Mr. Luehr's condition was at the time and how it progressed.

A. Yes, sir. I first saw Mr. Luehr on July 28th, as I recall, approximately at noon. I was called from the office by Dr. Joseph Marriott of Alameda, who stated that he had a man that had been severely injured and was in shock.

I rushed over to the hospital and we took him immediately to surgery. He was in a very precari-

(Testimony of Harry R. Walker.)

ous position at that time. He had a—superficially, his blood pressure was way below one hundred and his pulse was very rapid. He had a compound fracture of his leg, left leg, which was giving us the most concern. We were also sure he had a tremendous concussion injury of the chest because of his breathing and his short respiration.

We did straighten out the leg, and gave him several transfusions and, well, more or less life-saving methods were the things that were used first. As he progressed, we put a Kirschner wire through his leg to take care of the tibia and fibula fracture—that is the compound fracture here—then placed him on a splint, then a cast. At about the fourth or fifth day he began to respond fairly well, and we [251] were able to get some more X-rays and find out he also had severe fractures of the ribs, both on the left and the right side.

Approximately twelve days, I believe, to two weeks—anyway, after the cast, he developed thrombo-phlebitis of both legs and a mesenteric thrombosis which gave him a paralytic ileus.

Q. Doctor, you have lost me. Would you mind—

A. I will explain. This thrombosis is a blood clot that occurs in the veins. His mesenteric thrombosis—that is the supporting structure to the bowel, and he developed what we call a paralyzed bowel. In other words, he ballooned way up with obstruction. There was no gas, no movement of the bowels. And I might add he had interference with all the

(Testimony of Harry R. Walker.)

elements, in other words, the kidneys, bowels, and those things. He had to have a catheter in his bladder, and he had to have rectal tubes and enemas. In other words, they were not functioning.

By conservative measures we were able to put a Miller-Abbott tube into his mouth, into his esophagus, down into his stomach and intestines, and drain off some of the fecal content. We also had a rectal tube in him, and a tube in his bladder which took the place of function. We fed him by vein for approximately a week to ten days.

All during this time he was in such a [252] precarious position, that is, riding on the fence, we didn't do too much about his leg. We finally got him so that his chest was aligned and he was able to breathe fairly well, and got his pressure up, and approximately a week or ten days after the obstruction began to clear up, his temperature went down, and he began to look like we were going to salvage—as I told him, salvage his life.

And also our problem was to make a useful citizen of him. So we had already applied his leg cast, we dressed his wounds, and he kept complaining of the back and swelling in the right ankle, which we had neglected to take pictures of at first because it wasn't dislocated and obviously not very severely damaged compared to the other injuries. We found out he had a fractured astragalus.

Q. We don't know what that is.

A. That is the bone in the ankle which is called the—I don't know, astragalus is about all. It means

(Testimony of Harry R. Walker.)

the weight bearing bone in the ankle on the lateral side, in other words, the outside. This is on the opposite foot.

We had to put a splint on that, and that responded very well. At least, it relieved him of his pain. And he kept complaining of pain in his back. We knew he had a contusion of the cord, in other words, he had cord symptoms which are referable to some of the other symptoms he had, poor co-ordination in his leg. His bladder was not functioning and [253] his bowels were not functioning.

When you say "cord symptoms," are you referring to the spinal cord? A. Yes.

Q. When you say "a contusion of the cord," what do you mean by that?

A. We mean it had been traumatized. In other words, it had been jarred out of its position in the spinal canal, so to speak.

Q. Just pause there for a moment. You said something about a thrombo-phlebitis and called it a blood clot. How did you know he had that?

A. He started to run a temperature, and his legs swelled, and he was tender along the course of the femoral veins and along the iliac veins which go into the abdomen, and when he developed the paralytic ileus on top of that with complete cessation of all functions of his bowels and peristalsis, which is the normal way they contract, we knew—that is what we made our diagnosis on of thrombo-phlebitis.

Q. Go ahead, Doctor.

(Testimony of Harry R. Walker.)

A. Then following this he remained in the hospital and continued to improve slowly. We gave him numerous transfusions. After approximately three months we were able to get the wire out of his leg which we had tied the bones together with. They were completely denuded of skin, tibia and fibula, and [254] we tied the bone together and bound them with a splint. In other words, the least trauma we could add to his already precarious position, the better.

We began dressing the leg and he was feeling considerably better, but still complained of the pain in his back. We took X-rays of his back and found he had not only a fractured and compressed lumbar vertebrae, I believe L-1, but it was also posteriorly dislocated.

Q. What do you mean by that?

A. I mean it was pushed backwards clear out of position which is the normal position of the vertebrae approximately one-half inch, which accounted for the contusion of the cord and various cord symptoms and neurological symptoms he had.

Following this we thought his bladder and bowels began to function. He had sensation in his lower extremities, so we decided to neglect the back and let his general condition improve. After approximately three, three and one-half months, we were able to get him up and about on crutches and start his locomotion. But since that time—that was his first admission. That was up until about November, 1950. Then after that he was admitted for change

(Testimony of Harry R. Walker.)

of cast several times, and he has also had three or four admissions to Merritt Hospital for what we call saucerization, cleaning out of infected bone and dirt and material in this compound fracture of his leg.

The second time, he had no covering over his leg, so [255] he had skin flap transplants and another saucerization. This gave him more circulation to the infected and traumatized area and all over the fractured area.

I did that in two procedures, I believe, one on the right and one on the left, and grafted skin off the other leg. He continued to drain until, I think the last time we had him in was in August. Although improved, he was still draining in August, and we hospitalized him again and had to take out a considerable amount of bone in the sinus tract right down to the marrow, into the medullary cord, and we took all the anterior cortex of the tibia. It was evident at that time his fracture had healed and we were able to take—able to do without the cast.

Q. All this about the tibia, you will be able to show that better in the X-ray?

A. Yes, we can show that in the X-ray.

Q. Go ahead.

A. During this time he has been up and walking with the aid of a crutch or cane, usually two crutches. He says the leg does not bother—the tibia does not bother him so much, but he has pain in his left hip and in his back. He feels better and

(Testimony of Harry R. Walker.)

he has less muscle spasm and motion in his back if he has crutches under his arms and straightens out his spine. His general health has improved markedly. His ill humor certainly is much better, and his disposition, outlook [256] on life is better. He was very depressed and we had quite a few rounds with him to get him in shape, but his general condition is much better than it has been. He still has some other things that have to be done, but that is the picture to date.

Q. All right, then, to make it clear, as of this date you are still treating this individual; is that right? A. Yes, sir.

Q. And you, as his private doctor, have not yet released him from further treatment?

A. No, I have not.

Q. To give the Court some background, then, before I ask you about the prognosis—

Mr. Magana: Your Honor, how would the Court prefer the X-rays be shown? I want the Court, if the Court wishes, to see these X-rays.

The Court: Well, the usual way. The Clerk will handle it. I depend a great deal on the Clerk. You may all get over in the jury box, if you wish.

(The witness went to the shadow box.)

Q. (By Mr. Magana): Now, Doctor, I am going to hand you, and each time I will have to refer to it by the exhibit number, libelant's Exhibit 3-A. Would you place that in the box, and I am particularly interested in the left clavicle. If you will orient the Court? [257]

(Testimony of Harry R. Walker.)

A. The clavicle, or breast bone, are these two bones here. Here comes the clavicle, which is the right. There is the shoulder and the breast bone. This is the end of it and this is the normal contour. This is the injured clavicle, or the left one. This one here is broken in the outer third, an oblique fracture, and it has approximately one-fourth of an inch displacement.

The contour of the shoulder blade seems to be perfectly normal. There is evidence of some fractured ribs down here. Just how many, it is hard to see on this type of film.

Q. At all events, Doctor, to clear this up, this is not a compound fracture?

A. No, sir; this is a simple, oblique fracture of the left clavicle.

Q. And there are other X-ray views that show this did heal?

A. That healed in good position and he has solid bony union now.

Q. So far as you are concerned, he has no further complaint from that clavicle region?

A. He hasn't voiced any to me recently, no. We had some trouble with that at first from walking on crutches, but recently I have not heard any complaint about that.

Q. Then putting in libelant's Exhibit 3-B—would you put it in, Doctor? You can orient the Court as to the left side, [258] first, as distinguished from the right?

A. I will put the heart on the left side. This is

(Testimony of Harry R. Walker.)

the heart shadow. This is the left side. Also, it is marked on the film. He has several fractured ribs, as you can see. The first that you can note—let's see, this is the first rib, the second rib looks like it has a crack in it. The third rib definitely is fractured, with considerable displacement of the fractured fragments.

The fourth is completely off and overriding here. The fifth is cracked transversely there. Our X-ray man thought the sixth was, but that is purely academic. It isn't displaced and the damage here is from the ones that are displaced and impinging on the lung. I thought from some other picture he had a fracture of the lower rib on the right side.

Q. I think the record will show he had another injury prior to this. He did have an old fracture of the right lower rib.

A. There is one there in the right lower rib, but they are held, as you can see, in good position.

Q. So far as the ribs are concerned, then, what was the progress with reference to those? First, does he have any disability at the present time from the rib fractures that you have outlined?

A. I think not now. They were a big complication to us at first, of course, due to the abdomen being distended and blown [259] up, and the pain. He couldn't breathe deep enough to keep his lung blown out. Of course we worried about pneumonia and other things at that time. But in general we survived the troublesome part of the ribs, and I don't think they are a complication now.

(Testimony of Harry R. Walker.)

Q. Whatever further X-rays show, from an orthopedic point of view, or Mr. Luehr's point of view, you would say he need not expect any disability from the ribs as such?

A. I don't think so. Of course we have check X-rays on him, as a matter of fact, showing them healed in good position.

Q. Fine. Forgetting the ribs and going to the ankle, I show you libelant's Exhibit 3-C, and would you orient the Court there?

A. This is the right ankle.

Q. How do you know that?

A. It is marked "right," and the fibula is on the right side.

Q. That then—excuse me—is the bone we can feel right here (indicating)?

A. That is the lateral side, or the outside, of the ankle. They call it a skier's fracture. It is the one most usually hurt and the one most usually sprained. That is the triangular ligament, or deltoid ligament, and here is a fracture here. This was taken in 1950, July. It shows fracture. This bone has been pulled out by the ligaments, out of [260] the astragalus. It does not show any damage at this time, nor any damage to the medial malleolus. This is one of the original films.

Q. Tell us with reference to the bony content of this picture, the mineral content, how does that appear?

A. Perfectly normal. The position of the joint,

(Testimony of Harry R. Walker.)

I might add, is good. That is what you call a good joint reduction.

Q. I will hand you libelant's Exhibit 20. I will hold libelant's Exhibit 3-C and you put libelant's Exhibit 20 into the box. This is still the right ankle, is it not?

A. This is the right ankle. Look at it this way (indicating). Doesn't make much difference. You asked me how I can tell right from left. Sometimes I can't.

This picture was taken in March, 1952. This shows your fracture here as these little fragments haven't adhered entirely. There is also calcification developing in the ligament as far as, running from the lateral malleolus over to the astragalus.

This was the original. It isn't present there. You can see it in this film clearly. Also shows he had some damage to the other side of the astragalus in the ligaments. I don't think this is a fracture. I think this is a ligament pulled off the bone. That is the supporting structure of the ankle. That has calcified in this position.

Q. What can you tell us about the mineral content of the bones we see there on this film? [261]

A. As you can tell, these are markedly demineralized. The density is much less and the calcium much less than that in a normal bone. You can tell that by looking at the two films.

Q. Of what significance, Doctor, is it that the picture, referring particularly to 3-C for the moment, and comparing it with libelant's Exhibit 21,

(Testimony of Harry R. Walker.)

of what significance is it that you pointed out there was evidently some additional calcification over that period of time?

A. Well, that is what we call post-traumatic changes in the joint itself. In other words, that is the way we tell whether a joint has been injured or not, the amount of calcification in the ligaments, extent it is torn, extent of calcification. This was significant both with reference to the density of the bone and the calcification, and what we call post-traumatic arthritic changes are all due to the shock or injury the joint has received, and the extent of them we can judge years later by the appearance in X-rays, as I have described, the atrophy, density of the bone, and the calcification that appear there. As you can see, there is none in this picture.

Q. Since approximately some eighteen months separated the two pictures, what, in your opinion, based on reasonable medical certainty, is the prognosis with reference to that right [262] ankle?

A. It certainly has gotten worse in the last eighteen months, we will say, or the last year. In other words, he is undergoing more active changes now in the ankle. I cannot predict how much he will go through. Some of them have a few and stop. Others go on and get along all right. In other words, if they hurt them again, they might kick up and start all over. So it is like a rheumatic joint, depends on the weather and their activity.

Q. All right; leaving, then, the ankle, I want

(Testimony of Harry R. Walker.)

to put libelant's Exhibit 3-D, which was taken July 28th of 1950.

A. This is the date of injury. You can see this is just an X-ray taken right fast at the hospital after we had straightened the leg out. The leg at first was bent back in this position (demonstrating). This bone was sticking entirely through the skin.

Q. To make the record clear, the fibula or tibia?

A. This is the fibula and this is the tibia here, completely displaced, both of them, and it is shortened approximately one inch in that picture. It was released and we jiggled it any way we could and we straightened it to fix the blood vessels and the nerve.

Q. What do you say about the knee joint itself? Is there anything there?

A. I don't see anything outstanding. At most there would be this little depression here. In other words, a person has [263] some injury to his knee, and force sufficient to break the bone in the vicinity of the knee—but we didn't pay much attention to the knee. It looked fairly good there.

Q. How is the mineral content in that bone we see there?

A. That is very good. This is a normal content here, and that gives you a good idea of the normal appearance. This is the spongy bone around the knee which takes the shock of the body.

Q. Yes. Also soft tissues at the outside; is that correct?

A. Yes.

Q. Does that appear swollen?

(Testimony of Harry R. Walker.)

A. Yes, that is markedly swollen. That is unusual for it to be that swollen except in severely traumatized wounds. I mean, that soon after that.

Q. 3-F was taken, July, 1950.

A. This demonstrates what I was discussing a while ago. This bone fracture, this tibia, directly oblique; and this, the edge was sticking through the skin. The patella tendons fasten to the fragment and raises the leg like that. I went in, raised the whole thing up and sewed through the skin and left the other leg dangling.

Q. Is this picture, then, this 3-F, taken after you had partially reduced the fracture?

A. When I had already put traction on it. Here is another fracture I forgot to mention, a fracture in the lower third [264] of the fibula, too. Right here (indicating) I had forgotten it.

Q. This, to be clear, is the left leg?

A. Left leg. Left tibia, left fibula. It is a compound comminuted fracture of the first of the left fibula, another comminuted compound oblique fracture of the upper first of the left tibia.

Q. Libelant's Exhibit 3-F, I believe, again is taken the same day, July 28th. What, if anything, does that show?

A. That shows a fracture I had forgotten about in the lower third of the fibula. I think that the ankle is all right. I don't see anything unusual there, unless—no, I think that is old. I think that is just his age and hard work. I don't see anything

(Testimony of Harry R. Walker.)

unusual in the right ankle. Looks approximately all right to me.

Q. How is the mineral content?

A. That looks fairly normal to me. The trabeculations are obvious.

Q. I don't know what that is.

A. That is what lines the bone.

Q. 3-G was taken in August, about a month after the accident, or slightly less?

A. This shows how the fracture was after we had reduced it. In other words, after we put traction on it. This isn't a good picture, to be frank, of a compound fracture. But, as [265] I told you, we couldn't hold the fragment without putting in a wire, pin or screw. It was too dirty. So that we put this wire through and left it inactive until we could remove it, and we removed the wire about six weeks, eight weeks later, got it out of the way, because they keep the infection going; but we got it fairly well reduced. We have there an overriding of approximately a half inch, and it is brought out in this position.

We didn't worry about the fibula because it isn't the main weight-bearing bone. I think you will see in one picture the fibula has union, too.

Q. Does this picture show the man in a cast?

A. Yes, that is a cast out here, but it is a very light, thin cast. Probably a posterior mold, which means we left it open to dress the wound.

Q. Medically you men speak of an open reduction. Will you tell us what that is?

(Testimony of Harry R. Walker.)

A. Open reduction means the use of a knife, opening the skin up further, coming in with tools and things to reduce it. A closed reduction is one where the skin is not broken and you manipulate and handle it without going into the fracture site.

Q. What did you do here? A. An open.

Q. What about the fibula? Was that open? [266]

A. I don't know. We didn't pay much attention to the fibula. It was unimportant.

Q. The next picture, libelant's Exhibit 3-H, is another taken exactly one month after the accident, August 28th.

A. This again shows him in a cast, and shows the position pretty well. Shows we brought him down some with traction. One of the wires had been removed. This shows a comminution. As a matter of fact, I threw away, in other words, fragments of bone that were dirty. This shows very good position. In anything you could tell through the cast, it looked all right grossly.

Q. Any evidence of infection?

A. Yes, he is draining all the time. This was an open wound, but you could tell through the cast. We know it is infected. We see the evidence.

Q. Now, coming to libelant's Exhibit 1-A, and also 1-B, both taken in February of 1951—February 1st, 1951. A. Do you want both together?

Q. I think so.

A. This was approximately four to five months after the injury. This was—seven months. This also shows here he has had an operative procedure.

(Testimony of Harry R. Walker.)

First I will show you this. The fibula is lining up fairly well. I will show you another view later, that shows a union. He is beginning to show union and show callus down laterally. That is uniting [267] there. There is very little callus anteriorally, and medially.

Q. Medially? You mean inside?

A. Inside. This shows less infection. It has been taken out surgically by me. This hole and this hole shows infected granulation tissue which we had to clear away when the wires have been removed. We were trying to get the infection down so we can cover this with something. Contact is pretty good, and I think the skin grafts are taking. The skin graft over here, I think the general condition is poor. You have to have strength and vitality. We heal many cases not with excellent doctors, but by feeding them minerals and vitamins, blood plasma, and so forth, and when you get them in shape you can start your reconstructive surgery. **This is in** the first stage. This is about six or seven months later.

Q. At this point, I know you said something inadvertently, that you neglected the back for a period of time. Actually, you couldn't attend to the back until this was cured?

A. That is right. The back was not giving us too much trouble because he had to be in bed anyway. As long as his bowels and kidneys functioned he had sensation to his leg, you leave it alone.

(Testimony of Harry R. Walker.)

Q. What about the mineral content of the bone around the knee? [268]

A. That is markedly demineralized. The patella shows it more than the knee. This is normal density here, but these areas are lessened or decreased density, and also osteoporosis. That is a fancy name meaning demineralization, calcium being pulled from this supply to be put in the breech, so to speak, and it also comes from disuse as you get older. If you don't use a joint or a bone, you don't need the calcium and it is taken out and used elsewhere.

Q. When you speak of bone atrophy or disuse atrophy, is that synonymous with that word osteoporosis that you used?

A. They are used synonymously. Osteoporosis can be used to describe demineralization in older people with painful backs. You have probably seen cases where the vertebrae collapses. [269]

Q. Now, I want you to put up——

The Court: If you have any trouble with these medical terms, call it to my attention, will you?

The Reporter: Yes, sir.

The Court: All right.

Q. (By Mr. Magana): I am going to put up for you, put up two more exhibits, Exhibits 1-C and 1-D, both of them taken in April of 1951.

A. This shows approximately the same as the other that we just took down. It shows this beginning to heal, the fractures uniting at both anterior and posterior here. Now, the fracture lines become

(Testimony of Harry R. Walker.)

less distinct, you can see some demarcation of the distal fragment to the anterior fragment, pushed down in this way, pushed together, united, we don't care about the shortening, we give this fellow a fairly straight, firm, solid leg.

Q. You mentioned shortening. Does this man have any shortening of one leg?

A. Yes, about three-quarters of an inch. I say about, because I never get the same; I measured it, but I get within one-eighth of an inch, I would say.

Q. Then in this particular picture, referring to libelant's Exhibit 1-E, I notice an area in here that appears to be slightly blacker than the surrounding area.

A. That is the area of saucerization, just like saucer plus ization, where I have scooped out this bone and cleaned [270] out the infected bone and cleaned up the tissue, the dirt, various things, and the sinus tracts and the evidence of infection.

Q. I wonder at this point if you would tell the Court about how wide in circumference would this tibular bone be if you were to cut through it and look at it from above?

A. You mean cut through it transversely, like so (indicating)?

Q. Yes.

A. It is about an inch and a half in diameter at that point. It varies one way or the other.

Q. Would you explain to the Court as that bone is made up is it just solid, like a piece of marble?

A. No, it is hollow like a pipe. If you can—this

(Testimony of Harry R. Walker.)

is the cortex, the outer firm cortex on each side, and here is the marrow, so to speak, which is the heart of the bone where the blood vessels and the nerves and where the regeneration goes on, the blood cells.

Q. This is solid up here, but cancellus or soft bone?

A. That is right in the middle between the two, upper third of the tibia as it goes into the knee.

Q. Did you have to go into the marrow?

A. Yes, we had to go into the marrow and clean it entirely out.

Q. Then is the anterior or the front surface of that man's tibia at that place gone? [271]

A. It is entirely scooped out, yes.

Q. Will it grow back in?

A. I don't think so, not as cortex. It will grow in from the bottom and will vascularize. The scar tissue usually calcifies over a period of years and form just like the fracture, the callus that forms around the fracture forms in this.

The Court: Where on the picture is the drain coming from?

The Witness: It is coming from this hole here; you begin to see little holes and crevices in here.

The Court: Is that confined to just that immediate area?

The Witness: Yes, sir; it is.

The Court: Doesn't go any further either way?

(Testimony of Harry R. Walker.)

The Witness: Goes down to the marrow approximately one to two inches.

The Court: How are you able to reach the drain?

The Witness: You cup them out like this (indicating) and have curved instruments with what we call curettes, have a little spoon, and you go and you can tell the difference between scar tissue and normal marrow. If you can't, you go down until you bring out normal marrow, take the whole thing out, the scar tissue and affected granulated tissue.

Q. (By Mr. Magana): Tell the Court where, then, is the source of this infection; is it in the cortex or in the marrow? [272]

A. It is in the marrow. It was all uncovered, it was completely outside, full of dirt, the pants legs, we got some of that out, and underwear, socks, anything that will catch on it.

Q. Put into the box the next exhibit, which was taken on March the 15th, isn't it?

A. It is 1952, this is the last.

Q. Yes, if you will put both of them in.

A. All right, sir.

Q. We put in Exhibit No. 21 and Exhibit 22. Now, would you just—this, then, was taken just a few days ago, is that right?

A. Taken last week.

Q. All right.

A. This shows the bone to be healed, the fracture, well, is almost completely healed. See the callus coming, this is the upper end of the shaft,

(Testimony of Harry R. Walker.)

this is the lower end of the other shaft, completely united, it is solid clinically, it is very firm.

Q. Where is it united, Doctor?

A. Right at the fracture site.

Q. At the back or front?

A. Clear across, all the bone there now is united. He doesn't have the front portion of the cortex, the anterior third of the bone is gone for approximately two and a half, [273] three inches that has been taken out.

The Court: I am so limited, I have been looking at these X-rays for 40 years, I haven't gained very much headway. Tell me now, that bone, what is separating them, what material, if any?

The Witness: This one here (indicating)?

The Court: Yes.

The Witness: That is a non-united fracture of the fibula which he asked me a while ago why didn't I line that up. That little bone isn't important, it isn't the main weight-bearing bone.

The Court: I understand that, but wouldn't it be helpful if you did unite it?

The Witness: I don't think—we don't notice the difference. This carries the load, in his case it might have been, but it wasn't worth the risk of going in there and stirring up infection in the little bone that is of questionable importance.

The Court: Don't look at me too severely, I am not criticizing you.

The Witness: I am trying to explain it.

(Testimony of Harry R. Walker.)

The Court: I started out by telling you how little I knew about that.

The Witness: Yes, I know.

The Court: I always want to be informed. Now, you [274] discovered that separation early?

The Witness: Yes, we knew it all the time; yes, sir, all the time.

Q. (By Mr. Magana): You might, in taking Mr. Luehr's leg, will you tell the court, in order to reduce that fibula as it was separated in July of 1950, how would you have had to reduce it if you were going to?

A. You would have to open it up and you might spread the infection, and your dirt, and stuff into this area.

The Court: Is that the area infected?

The Witness: No, sir, it is not. This one was not punctured out through the skin.

The Court: That is what I thought.

The Witness: And you asked the question of separation, the scar tissue is holding them together, now.

Q. (By Mr. Magana): Excuse me, Doctor, but in a tibia fracture how far down do you have to go in order to make the open reduction of the tibia, say, at the proximal one-third of it?

A. You have an incision approximately eight inches.

Q. In length? A. In length.

Q. How deep would you have to go?

A. Into the tibia?

(Testimony of Harry R. Walker.)

Q. Yes. [275]

A. Down to the other side of the tibia, which is one and a half or two inches, maybe three at times. You can see on his leg probably a little better what the problem is, but to get back to what the Judge is talking about, when you have fractures here, two bones, and they are severe, you always line up the main weight-bearing bone——

The Court: The one that is most useful?

The Witness: That is right, and let the other follow along, and if it is necessary to fix it, you fix it later.

Q. I will ask you then, these are taken March 15, again of this year, 1952, Libelant's Exhibit 24 and 23, these again show the condition as it existed as of last week, is that right?

A. That is right, as of now. And this shows that he has healed very well, very solid union of the tibial fracture, shows the non-union of the upper third of the fibula fracture, shows the bony solid union of the lower third of the fibula fracture, it shows this saucerized area here. The defect in the bone can be seen very plainly. This is outlined there and as it is outlined here.

Q. Now, with reference to the mineral content of those bones, Doctor, can you tell us what their present condition is?

A. It is still demineralized as you see here. These are the trabeculation or projectural lines, as they are called, [276] although it is better than it was on the last film that we showed. In other

(Testimony of Harry R. Walker.)

words, more calcification, more movement now, he is using his knee now and it is beginning to return gradually, although there is marked decalcification of the bones about the knee.

Q. At this point, Mr. Luehr, would you step up here just a minute, please, since we are finishing up with the leg.

While Mr. Luehr is coming up here, he has complained, Doctor, of an inability to move that left leg much beyond a 90-degree level in a flexion movement. Can you tell the Court is there anything on these X-rays that would account for that?

A. Yes, but not entirely so. Most of that is soft tissue. In other words, scar tissue around the joint, and it in general is just an atrophic joint. Take a normal joint, put a cast on for nine months or a year, and it has a terrible time opening it up.

Now, this osteoporosis makes the joint sore and tender, too, and that would tend to slow it down. In other words, we start out with practically no motion and gradually open it and we are very pleased to have 90 degrees in this man.

The Court: If you had been here all the time you would see how you were improving every day (to the libelant).

The Witness: I had to pull these out many times to convince him. [277]

Mr. Magana: Doctor, would you show the Court now on Mr. Luehr the area of the——

A. This is the wound site, as you can see. This is where the fragment stuck completely out. As a

(Testimony of Harry R. Walker.)

matter of fact, it was stuck out here; where the skin is over here, I borrowed from here and spread it over there, and the skin that is on this side I borrowed from over here about an inch, slid this over. He has still some draining in there, although much less than he has had in the past, and I have been keeping my fingers crossed in the hopes it will settle down and won't have to saucerize it again. An X-ray man, my partner, several other doctors, seem to think that we will have to saucerize. I think I agree with them that we will have to clean it out, slow it down, because he is so much better.

(Witness illustrating on libelant's leg.)

The Witness: He goes back past 90, there is 90 degrees, and he will go about five degrees past that. He doesn't like it much, but we are forcing him more all the time trying to get him——

The Court: Trying to get the circulation so that it will stimulate it?

The Witness: The healing?

The Court: The weak parts.

The Witness: Yes, sir, the healing, have to get circulation. You see, this was completely open here, and until you [278] get good skin over this you are just up against it. In other words, the bones won't heal, the infection won't go away, or the skin won't heal at all. You can see it shortened it, you can measure it, it is just about three-quarters.

Q. (By Mr. Magana): While we are on this question of that infection there, Doctor, tell us, with

(Testimony of Harry R. Walker.)

reference to that infection, what is there that prevents it from spreading?

A. Well, penicillin has been our greatest help that we have had, and some new antibiotics. Nature throws a wall around the infection. Say that you get a boil or a carbuncle sort of infection, first it is red all over, and pretty soon it narrows down to a little hard area. That is nature's arrangement of protecting or walling it off. There is always a danger of spreading it by surgical intervention. Consequently when I go in to scrape it out it is apt to spread in the blood, but with antibiotics that is possibly you wouldn't spread it too much, the big danger of that spreading.

Now, he still has an infection in there. If that wound should swell over, the pus would build up and go into the medullary canal. That is why I have to clean it out again.

Q. What about if he were to suffer any future damage to that, such as tripping, falling or knocking against it, would that tend to reactivate the infection at all?

A. Oh, yes, it is very liable to trauma.

The Court: See how he is helping himself [279] now?

The Witness: Yes, Frank's done a lot of this under protest.

(Testimony of Harry R. Walker.)

The Court: Well, but I figure you got him persuaded now; it is in his interest, too.

The Libelant: He don't wait on me any more.

The Witness: He has to take care of himself in the office now, and we have been able to get him going fairly well.

Q. (By Mr. Magana): Now I am going to put Libelant's Exhibit No. 29 in the box. I wish you would explain that to the Court.

A. This is a lateral view of the lumbar sacral spine, lumbar sacral spine meaning where the backbone fastens onto the pelvis or tailbone. This is the angle of the lumbar sacral joint here. The angle looks fairly normal. The cartilaginous space in 3, 4 are normal, but in the fifth they are completely collapsed and there is raw bone riding on raw bone, has an unstable joint.

Q. Doctor, he complains of a distribution of pain down from the buttocks on down the back of the leg. Is there any connection between that and what you observe from this Libelant's Exhibit No. 29?

A. There certainly could be for three reasons. One is injury to the upper lumbar spine; two is injury here, his lumbosacral area. In other words, this is just loose fibula [280] joint, like a wheel without the bearing, the cushion is gone. The distribution of the pain seems like it comes more from this area. The other thing that causes the pain he complains about upon the left side is his hip. He

(Testimony of Harry R. Walker.)

has some degenerative changes in the left hip which can account for this pain.

He has three reasons, and I couldn't say just which one is primary, because the reason I doubt if it is the upper segment of this lumbar spine, although I am more inclined to believe it has to do with the lower sacral joint or the hip joint itself.

Q. Is that because of the particular nerve that goes—

A. Goes down the side. In other words, the distribution for the high nerve is more in the pelvis and in this area, goes over the trochanter of the hip and down the side, the sciatic nerve.

Q. This X-ray that I have shown you, Libelant's Exhibit 29, was taken last week, again by you, March 15. Now, I want you to put in Libelant's Exhibit 3-I, which was taken the day of the accident, July 28, 1950.

A. This is July 28, 1950.

Q. Yes.

A. This one here, this is the left side.

Q. Now, if you will, Doctor, orient us first.

A. This is the left side right here; this is the right side. These are the lower ribs on the left, these are the lower ribs [281] on the right, 11 and 12, and I was right, he had a fresh fractured rib right here, it shows it, of the 11th, on the right.

Q. On the right side? A. Yes.

Q. That is a fresh one?

A. Yes, that is a fresh fracture. He had some old fractures there, too, but—all right. Now, these

(Testimony of Harry R. Walker.)

are his ilium or pelvis bones on the left, these are the hip bones and hip sockets on the left and the right. They are perfectly normal, contour here is normal, joint space seems to be normal with the exception of one on the right. It seems like he has an extra ossification, which is anatomical.

Q. No relation——

A. I think it is an old injury of childhood or a congenital thing.

This first is, shows the lumbar vertebrae, 5, 4, 3, 2, 1, D-12, dorsal 12, or you can count 12, 1, 2, 3, 4, 5. This shows the damage to the first lumbar vertebrae here. See that it is squashed down, these are fragments of the fracture out to the side, pushed out here. This is the transverse process that is completely off on the right side of the first and of the second. Those seem to have all—yes, it is off on there.

Q. What is this, Doctor, that line that I notice right in [282] here (indicating)?

A. That is a fracture of the lamina which goes right down through the middle of the vertebrae, this vertebra was just squashed and just pushed out and mostly back. I can demonstrate that on another film.

Q. On the side view? A. Side view.

Q. Now, with reference to the transverse fractures, as I understand it, as the Court is looking at this light, it would be towards the left as if——

A. This is the right side (indicating).

(Testimony of Harry R. Walker.)

Q. And you said there was a fracture of the first transverse process?

A. There it is, right there, and completely displaced. It is clear off. This is a normal transverse process here.

Q. That was the day of the accident, and calling your attention again to the first lumbar vertebra and the line that appears there, I think we have a spinal canal here which will illustrate this in a moment. Would you put on Plaintiff's Exhibit or Libelant's Exhibit, excuse me, 30, which was taken on the 15th day of March of 1951?

A. This is the right side again; this is the left side. This shows your fracture very plainly now, 11 and 12, of the ribs, on the right side. On the left you can see that this fracture line here almost is completely obliterated. [283] It seems as if the body of the second lumbar vertebra has completely fused with the body, what is left of the body of the first. There does not seem to be complete union across here between 12 and 1. You can hardly tell the normal architecture of the vertebrae. This transverse process is still completely off on the side. This one seems to have held together. On the second, fourth, third, and fourth on the right side seem to have some trauma to them, but they are held there in good position, certainly shouldn't give him any trouble.

Q. If you had, Doctor—excuse me, would you hand me that—this is just a small skeletal model.

(Testimony of Harry R. Walker.)

Would you pick out for the Court the first lumbar vertebra?

A. (Demonstrating): This is the first lumbar vertebra, the 12th thoracic, the dorsal has the rib on it.

Mr. Resner: Turn it this way.

The Witness: This is the first lumbar here, first one below the twelfth, or you can count either 5, 4, 3, 2, 1, count them either way.

Q. You spoke of the lumbo sacral joint?

A. That is this, the swayback joint, so to speak.

Q. I think you said there was a mark through the back of that?

A. The lamina here, that means right there, right through here, demonstrated very clearly in the X-ray. That was very [284] marked.

Q. And where does the spinal cord go down?

A. The spinal cord goes right down here, this piece of metal goes right down inside the vertebrae, and the nerves come out through these little openings, that is the body and that is the lamina, that process in the back. In other words, in the vertebrae and the fossils they have large spinus processes to protect the cord, and very small bodies.

Q. And the cord as such, where does it end?

A. It ends as such at about the level of the 12th, one or two. They vary. From there on you have small nerve fragments that come off.

Q. All right. Libelant's Exhibit No. 31 is a picture taken the 29th of October of last year, 1951, about four and a half months ago. I want you to

(Testimony of Harry R. Walker.)

show the hip joints and sockets to the court, orienting us first with right and left.

A. This is the right on this side; this is the left over here. That is the hip joint, the pelvis, and a portion of the lumbar spine and the sacrum. On this side, which is the right, the joint looks normal, the space in between the articulating surfaces are smooth. You see this extra-ossification center I called your attention to a while ago, and the density of the bone appears normal, although it is a little thinned out. It is near enough normal for his age, size and activity that he has had during the past year. [285]

On this side you can see considerable demineralization of the trochanteric region, the upper femur and head of the femur and the acetabulum, that is just the cup for the hip. Compared to this side you can see the bone is very much more dense on this side than on this side. These are shot at the same time, same film, same exposure. There is some narrowing of the joint, but not much. I wouldn't pay too much attention to that.

Q. I want to show you Libelant's Exhibit No. 2, would you put it in the way you want it, taken last week. Point to the left hip for the Court.

A. This is the left side, this is the right side over here. It is also marked that way on the film. This shows more demineralization, particularly the upper shaft of the femur. There are some jagged edges developing and narrowing of the hip joint on this side. There is a considerable amount of deminerali-

(Testimony of Harry R. Walker.)

zation of the acetabulum here compared to the opposite side.

Q. He complains of pain when he lies down on the left side or when he attempts to walk, that he favors that left side quite a bit. Looking at that left side Libelant's Exhibit No. 32, can you account for it in any way?

A. As I said, there are three ways. Certainly if this is all he had you can say this gave him the pain, in the hip, but also his leg on that side which takes more weight, and [286] the lumbar sacral spine was undoubtedly damaged in this injury, and he has this injury up above, I would say that this is due mostly to his pressure, to the changes going on in his hip, and secondly to the instability or unsteadiness of the lumbar sacral spine.

Q. Considering there were four and a half months between the previous radiogram, Libelant's Exhibit 31, and this one, Libelant's Exhibit 32, can you tell us now, basing your opinion on reasonable medical certainty what the prognosis would be with reference to that left hip in this man if he continues to use his leg?

A. Well, in the last five months, as the X-ray shows, it is undoubtedly going through a post-traumatic regressive change. In other words, it is degenerating from the hip itself, and the bones about the hip, the joint itself.

Q. What do you think the future holds for Mr. Luehr?

A. I don't know. He undoubtedly will have some

(Testimony of Harry R. Walker.)

permanent damage in the hip joint, but just how much he is having now we can't say, because it still is in active process. It may clear up, and it may stay right where it is.

Q. Will it get better?

A. It may, but most of the time they lose the pain, but they don't get any more motion, they stop right where they are, or go on and run the course and have more pain and more damage. It certainly would get worse with more activity and [287] usage right now.

Q. In September, 1950, just shortly after this accident happened, would you put this view in the box, that is September of 1950, and it is Libelant's Exhibit 3-J. Now,—

A. This, you can see here, this is the fifth lumbar, fifth, fourth, third, second, first, here is the last rib which you can see. This vertebra, this vertebral body here of the first lumbar vertebra, it has been completely squashed, smashed together, pushing fragments of bone in this direction, but mainly dislocating the entire vertebra approximately one-half back through the spinal canal.

Q. Using another shot just on the side there, Doctor, would you indicate to the Court diagrammatically using that other X-ray merely as a ruler to show what displacement there has been toward the cord proper?

A. This shows better than this one.

Q. This next one, Libelant's Exhibit 33, which

(Testimony of Harry R. Walker.)

was taken just a little while ago, wasn't it, March 15?

A. That is right. This shows the dislocation of the vertebra much plainer and shows the spinal canal coming down here fairly well until you get to the first lumbar vertebra, and there it is impinged at least half to three-quarters of the width of the canal, so much it is closed almost, this aperture, entirely. Here is the normal aperture where [288] the nerves come out. This is still pretty good, not so large. It is half the size here and about a fourth here.

Q. And what has happened to that forward portion? You told us previously that the first lumbar vertebra had some pieces that had been pushed out; what has happened?

A. They seem to have united onto the body of the first and also attached to the body of the second. In other words, you have got a spontaneous fusion there of the two vertebra, of the first and second, of the bodies, and I think that they are also solid back here from looking at the anterior. Pretty hard to prove by X-rays, but I think they are.

Q. When you say solid back here, where do you mean?

A. Back here, pointing to the posterior portion of the lamina in the spinus process in this area here.

Q. Now, you have in here, this is another shot taken in between——

The Court: Did you say you had some more?

(Testimony of Harry R. Walker.)

Mr. Magana: I am just going to conclude with just one——

The Witness: No union between the twelfth and first, I meant.

Q. (By Mr. Magana): Would you put up Libellant's Exhibits 34 and 36 so we can conclude the X-rays?

A. These are the obliques that show a bony union in between the first and the second all the way across, shows no union between the twelfth and the first. This is a little different [289] view here. This is the twelfth here, this is the first and the second, and you can see complete bony union across there. This has not united up above, which would be desirable if we had a fusion.

Mr. Magana: Does the Court wish to recess now?

The Court: I think we better take a recess.

(Short recess.) [290]

The Court: Proceed, gentlemen.

Q. (By Mr. Magana): Now, Doctor, that you have been through the X-rays and the general outline of what transpired in this case, tell us, you received a history from this man about the happening of an accident, is that right?

A. Yes, sir. Rather spotted, though. He was unconscious, mostly, at first.

Q. The record will show he claimed to have received a crushing type of injury. Are these fractures and all these injuries a type that would, in

(Testimony of Harry R. Walker.)

your judgment, come from a crushing type of injury? A. Yes, I think so.

Q. As Mr. Luehr sits here now, and as your patient, giving us only your opinion on reasonable medical certainty, first of all, is there any further immediate treatment that he needs?

A. Yes. The wound will have to be saucerized again and the defect, as you can see, the scar, will have to be closed.

Q. In connection with that, will that require hospitalization? A. Yes, it will.

Q. For how long a period of time?

A. Approximately two weeks if everything goes according to schedule, get no recurrence of his infection, etc. [291]

Q. Can you tell the Court what the reasonable value of his hospitalization per day would be in such a case?

A. Hospital care has gone up so much recently, runs around \$20, \$25 a day as a rule. That is food, drugs, board, everything.

Q. What would the services of a surgeon be?

A. I would say around \$250, \$300.

Q. And in that operation you say a saucerization would take place, is that right?

A. That is right. Cleaning out again, getting the scar tissue out of the way, and the affected granulated tissue.

Q. When do you expect to perform such an operation on Mr. Luehr?

A. I should say it should be done in the very

(Testimony of Harry R. Walker.)

near future, within the next few weeks.

Q. After that operation has been performed—I think the record will show he has had six operations on his leg, is that about right?

A. That is approximately right. Some have been major, some minor, but I think there have been six fairly major procedures performed on him.

Q. Would you then expect this drainage or infection to clear up?

A. We expect it to. It is down so much in quantity that we hope this will clear it up. There is no guarantee it will, [292] but the expectation from the history, his general condition, all indicate this will clear it up.

Q. Is there any name medically for this infection you have been treating in this man's left tibia?

A. Yes. Post-operative osteomyelitis.

Q. What does that word mean?

A. Infection of the bone.

Q. Will you tell us, then, Doctor, to make it clear, if you do clear it up this time with reference to that infection, does that leave Mr. Luehr free forever of any further infection in the tibia?

A. No, unfortunately it does not. We are in much better shape with the osteomyelitis than we expected at first, due to penicillin and the antibiotics, streptomycin, aureomycin, and so forth, the various drugs, but they are prone to flexibility, such that if any injury occurs, a recurrence——

Q. Would he have a period of convalescence?

A. That is right. Once out of the hospital he

(Testimony of Harry R. Walker.)

will be at home. He will be in the office a couple of times a week at first, the first few months, and then one or two times a week over two or three months, and, I don't know, he heals a little slower than the ordinary, normal individual in good health would, you see.

Q. With reference to this back condition and the X-rays you showed the Court—I think that was libelant's Exhibit [293] 33, side view of that compressed first lumbar vertebrae.

A. The originals and the last ones that were taken?

Q. Yes. A. Yes, sir.

Q. With reference to that condition of the first lumbar vertebrae, the one you say is crushed and has been pushed back into the cord space, what if anything is indicated for Mr. Luehr in that regard?

A. Nature has already done half the job. In other words, he has a spontaneous fusion between one and two lumbar.

Q. In the body?

A. In the body, that is right. But it doesn't have a union above. This is still loose. There is no joint left to stabilize the spine and it should be fused. In other words, the joint between 12 and 1 should be fused.

Q. Tell us why you haven't done that so far?

A. His condition has not been sufficiently good to permit it. In other words, you don't like to do any major bone grafting or reconstructive procedure in the face of infection. He still has that infection

(Testimony of Harry B. Walker.)

in his leg and his general condition is not good. The opportune time has not arrived. There has been maximum result from the bone graft.

Q. In reference to talking about the term "bone graft," Doctor, whereabouts would you get the bone to fuse the spine in Mr. Luehr's specific case? [294]

A. Well, you like to take it from the patient himself, because to a limited—you can take it from the right ileum or the pelvis, and you also take some from the leg, the tibia on the right side. That may be enough. It may not be sufficient and he will have to borrow some from the bank, but that does not unite quite as well as your own bone, so we prefer to take it off him if we can.

Q. With reference to that operation you have been talking about, demineralization, and this word osteoporosis. What, if anything, does that have in Mr. Luehr's specific case?

A. You mean as far as bone healing?

Q. With a fusion operation.

A. We would expect a union or complete fusion, bony fusion to form as the result of graft much slower in his case than that of a normal individual in good health. Of course, no individual who is normal would need a spine fusion, but a person in generally good health would heal much quicker than he would. That is the reason for delaying it this way until he has had the maximum result from his reconstructive procedure.

Q. Do you recommend, then, a fusion in Mr. Luehr's case? A. Yes, I do.

(Testimony of Harry B. Walker.)

Q. When would you start that fusion?

A. As soon as we clear up his leg.

Q. If the leg is all cleared up within three months, you [295] would recommend the fusion operation at that time? A. Yes.

Q. The main purpose of the fusion would be what?

A. That is to take the—to stabilize the vertebrae and take the motion out of the spine, the painful motion. In other words, it is a result of fracture, the rough—calcification—the disk spaces are collapsed, collapsed cartilage is destroyed, and we can stabilize it. Nature has tried to stabilize it so that our job is fifty per cent of what it would be ordinarily.

Q. Once fusion is done, you say to stabilize the joint, what will be the net effect on Mr. Luehr?

A. That should do quite a bit, should take quite a bit of pain out of his joints, should prevent further calcification and demineralization, some of which has occurred. I expect it to stiffen his spine, but it will be comfortable and it will be painless. As it is now, he is not comfortable when he gets up. Any weight bearing so the full weight of his body comes on his spine, it hurts, and there is muscle spasm. He is more comfortable on crutches. You can hang him up on his shoulders and his spine straightens out and he feels better—or by his neck.

Q. Will that require hospitalization?

A. Oh, yes.

Q. For how long a period of time? [296]

(Testimony of Harry B. Walker.)

A. Usually two or three weeks if things progress without complication.

Q. At the same rate? A. What?

Q. Same rate, \$20 or \$25 a day? A. Yes.

Q. How about the operating room services and anesthetist?

A. They run approximately \$100 for that type of thing.

Q. What about the surgeon's bill?

A. That would usually run between \$400 and \$500. Approximately \$450.

Q. In this case so far you have been paid by the Firemen's Fund, have you not?

A. I think so, sir.

Q. On what basis, private patient or industrial?

A. On an industrial rate.

Q. Is there any difference in the rates?

A. Considerable.

Q. After the operation has been performed, then would he have any period of convalescence?

A. Yes, he would be practically an invalid. He would be able to go to the toilet and be able to go to his meals, but he would have a cast or brace on for approximately six months, depending on progress of the graft as checked by X-ray and clinical examination. After six months he would [297] be allowed more liberty. Be up and about more, and more motion, and so forth. One year, you can find out if a graft will unite or not. They are, in my hands, approximately 75 per cent successful. Some surgeons report higher results, some less, but I

(Testimony of Harry B. Walker.)

think that is a good average. Approximately 75 to 80 per cent.

Q. At the end of that time, then, insofar as the back and the leg are concerned, would you expect after three months and the year period with reference to the back, his condition with reference to the back and leg would then be on a permanent and stationary basis?

A. Yes, we anticipate that. That is, if we encounter no complications.

Q. You have already testified to the left hip and as to the right ankle. Is there any treatment indicated for the left hip and the right ankle?

A. I know of no procedure that will be required—that will improve it, other than rest and limited activity. In other words, this with these joints is post-traumatic. They won't take much kicking around like prolonged standing, walking, climbing, or any other injury to those members.

Q. At the end of that period of time, taking it to be a year and three months, at the end of fifteen months will Mr. Luehr require any further medical treatment or medical vigilance? [298]

A. Well, that is hard to say. In other words, from time to time he will have—he should be checked by X-ray every six months for the first three or four years. At his age, what they usually do when they come in, if the hip hurts, put on heat or give him physio. He is in and out of a brace, in and out of bed. You just treat him symptomatically. In fact, once the bone is healed you have

(Testimony of Harry B. Walker.)

done all you can do and there will be no measured medical stuff that I can anticipate, but it will be more nuisance value. Maybe major to him, but not to me, other than to make him comfortable.

Q. At the end of this 15 months period of time, again basing your opinion on reasonable medical certainty, with reference to his back and leg, would you expect that man to be able to go do the work of a stevedore, getting on and off of beams, say, seven feet above a deck, carrying sacks, wheeling heavy articles, any work of that sort?

A. No, I would not.

Q. Would you expect him to be able to drive, say, a caterpillar tractor or any type of heavy machinery?

A. No, I would not.

Q. Can you give the Court, so that the Court has something here from you, of the percentage of disability you would expect from this man's back even after the fusion has taken place? [299]

A. May I ask a question? What do you mean, comparing? Compare percentage of disability as a stevedore, or——

Q. No. Just if you can give us what disability—I will put it another way: What type of work, if anything, do you think Mr. Luehr will be able to do at the end of this 15-month period?

A. Well, I anticipate, judging from the progress of the case and the severity of the injury, he will never be able to do any heavy manual labor of any type. I should say he is only fit for the most sedentary type of work. I don't think he will be able

(Testimony of Harry B. Walker.)

to walk any distance or stand on his feet any time. I don't think he will be able to carry any loads of 25 or 30 pounds with any degree of comfort. Even if he doesn't do that, he may still be uncomfortable, as I have mentioned.

Q. So that we all understand the significance, Doctor, by "sedentary," what do you mean?

A. I always like to think of sedentary, you sit down. His activity will be restricted activity such as require his brain rather than his physique to carry out his objectives.

Mr. Magana: All right, that is all.

The Court: Any cross-examination?

Mr. Harrison: I have one or two questions.

The Court: Let me make a remark in passing. I never saw this gentleman before. He never testified before here. [300] Have any of you gentlemen contacted this gentleman at any time?

Mr. Kay: I am sorry, I didn't get that.

The Court: Read that, Mr. Reporter.

(The Court's comment was read by the Reporter.)

Mr. Kay: He has never testified for me, your Honor.

The Court: Anybody else?

Mr. Harrison: No, your Honor.

The Court: I can't help—I am always too outspoken, I know. From the standpoint of fairness in doing things expected, I think he did a pretty good job.

(Testimony of Harry B. Walker.)

Mr. Harrison: We all commented on that, at recess, your Honor.

The Court: If that is any comfort to you, I mean every word of it.

The Witness: Thank you very much.

Mr. Harrison: I think we also admire your skill in getting Mr. Luehr in the condition he is in now, Doctor.

Cross-Examination

By Mr. Harrison:

Q. There is one thing bothering me, though. Doctor, since the filing of this libel in this case, we have been anticipating further operations to Mr. Luehr's leg. I would like to ask you, Doctor, has there been any relation to the postponement of the operation to the time of this trial? [301]

A. Indirectly, yes; but directly, no. This guy has gone along and the drainage gets a little less each time. You take the dressing off and one week you have three drops, and the next week you have a spoonful, and he has been getting a little less all the time. The slower the exudate or discharge, the more healing. In other words, it makes your operation much slower all the time, you see, and therefore you put it off just as long as you can, because there is a chance you may stir it up. I know several consultants have seen him and some of them thought I should go ahead and saucerize him.

Q. That is right.

A. But he is much better now than two or three

(Testimony of Harry B. Walker.)

months ago, general condition and everything. But he is about stabilized now. For the last six or seven weeks it has been about the same, three or four drops each time you change dressing.

The Court: I am amazed how he kept his weight under the conditions.

A. He has gained weight in the last six months considerably. He has perked up considerably the last six months, your Honor, since we got him up.

Q. (By Mr. Harrison): Did he at any time specifically request that you if possible delay the operation on his leg until after the trial? [302]

A. No, Frank never has. He has left the whole thing up to me.

Q. Did Mr. Resner? A. No.

Q. No one ever suggested that to you?

A. No. He has told me the trial was coming up.

Q. Yes. You said indirectly it did have a relation? A. That is what I am talking about.

Q. You took it upon yourself to delay it?

A. Yes. Wouldn't make any difference, a few weeks. As a matter of fact, he is a little better off, and he explained to me he would rather be here.

Mr. Harrison: I believe that is all I have, Doctor. Thank you very much.

The Court: Any questions?

Mr. Kay: No questions.

Mr. Cooper: I would like to ask a couple of questions, probably for my own edification. [303]

(Testimony of Harry B. Walker.)

Cross-Examination

By Mr. Cooper:

Q. Doctor, in the course of your direct, you made mention of a heavy protein diet, if I am not mistaken, as having a beneficial effect on the functioning of the body and to heal wounds?

A. Yes, sir.

The Court: Don't you listen to Lindlahr over the radio on that?

Mr. Cooper: Fortunately Lindlahr doesn't suit my hours.

The Court: Have you ever heard of Lindlahr?

The Witness: Yes, sir, I have.

The Court: He encourages that sort of thing himself. Is that what you had in mind, Mr. Cooper?

Mr. Cooper: Didn't have in mind Lindlahr, if that is what you mean.

The Court: All right, proceed.

Q. (By Mr. Cooper): Doctor, did you prescribe a protein diet of any sort to assist in healing?

A. Yes, we tried everything in the world with him. He was unable to eat or digest anything, and we had a very tough time getting him—we had to feed him by vein most of the time.

Q. Is he presently on a heavy protein diet?

A. He is presently on a pretty good diet, I don't know what diet he is on. [304]

Q. Are you prescribing any diet?

A. No, sir, I am not. I prescribed a good general diet, high protein, mineral, just a well-rounded diet.

(Testimony of Harry B. Walker.)

I am not so much in favor of special diets, as long as he has a well-balanced diet.

Q. Doctor, the Navy—I mean, Doctor, the Navy experimented with men wounded during the last war and they found a diet, for example, like good steaks, was the best sort of diet that a Navy man can get to recover.

A. That always makes for mental health a little bit, but we have found out that the Wilbur diet, which consists of eggs and cream, milk, concentrated protein products, predigested proteins mixed up, a horrible concoction, which tastes lousy, was the best thing to get them back on their feet, more so than the steak, were synthesized, used by the body.

Q. A steak diet is just emotional?

A. No, steaks are good, sure; affects my emotions certainly.

Q. Just the mere mention of them.

Mr. Resner: When did you have your last steak? Probably last night.

Mr. Cooper: I don't remember.

The Court: You can't remember.

Mr. Cooper: No, steaks are kind of scarce.

The Court: I am much the same way.

Q. (By Mr. Cooper): Ask you one other question along this [305] line, Doctor, that is, you mentioned milk, I believe, in that concoction that you referred to. Is it beneficial to have a heavy milk diet in order to supply lime?

A. You mean the calcium?

Q. Yes.

(Testimony of Harry B. Walker.)

A. Well, you got to have a sufficient amount, but we have never been able to prove that giving calcium tablets, excessive milk really benefited any more than a normal diet intake, say, of one quart of milk a day. All it does is blow you up and fill you full of gas.

Q. A considerable quantity.

A. By using predigested proteins will give us the same amount of calcium, and give us that much more in an ounce, and it is much easier.

Q. To be sure I understood your testimony correctly, the major damage to this unfortunate man was done by, caused by the downward crushing blow, is that correct?

A. I would think so, yes, sir.

Mr. Cooper: That is all.

The Court: Any other questions, gentlemen?

Cross-Examination

By Mr. Kay:

Q. That includes the fracture of the right ankle, too, is that right?

A. Yes, that is when you usually get these normal weight-bearing fractures, whenever you have a blow on the head you are [306] likely to get a fracture like that.

Q. That means all his injuries he received——

A. Will tend to——

Q. ——this history of injury that he got?

A. I interpret them as such.

(Testimony of Harry B. Walker.)

Recross-Examination

By Mr. Harrison:

Q. What about the fracture of the leg, you think that was done by the fact that the leg was, according to what we have heard here and what is in the record, the leg was laid out on a beam and then pinned down, or was that caused by his being hit on the shoulder and his whole body?

Mr. Resner: Talking about the right or the left leg?

Mr. Harrison: Talking about the left leg.

A. It could be caused either way. In other words, obviously the left leg received some type of blow the right one didn't; the right one didn't break the same way.

Mr. Harrison: Thank you.

Mr. Magana: That is all. May the Doctor be excused?

The Court: No, I am going to take the Doctor in my chambers.

We will take an adjournment until 10 o'clock tomorrow morning.

Mr. Harrison: Your Honor, please, there is one question which I overlooked asking Mr. Luehr when he was on the stand which I think will be necessary to the record. [307]

Mr. Resner: Why not ask him in the morning?

Mr. Harrison: I was anticipating perhaps Mr. Luehr won't be here.

Mr. Resner: He will be here.

Mr. Harrison: I was going to say I wanted to ask——

The Court: It will do him good, the effort in coming here.

Mr. Harrison: I wanted to ask him before the libelant rested.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m., Thursday, March 20, 1952.) [308]

March 20, 1952, 10:30 o'Clock A.M.

The Clerk: Luehr vs. United States, et al., further trial.

Mr. Resner: Ready.

Mr. Harrison: Ready.

Mr. Kay: Ready.

The Court: I intended to call to your attention last evening I had to go to a funeral this morning. That is the reason for my absence. Proceed.

Mr. Resner: The libelant rests, your Honor.

Mr. Harrison: In that event I have my doctor here, so I would like to have the doctor testify.

Mr. Kay: Your Honor, so that we may facilitate this case, I wonder if Mr. Harrison could give us some idea about the length of time his case would take?

Mr. Harrison: At present, your Honor, I would be hesitant to do so. I have several subpoenas out which the marshal has advised me he is having difficulty serving.

Mr. Kay: Assuming——

Mr. Harrison: Assuming they are served, I would estimate the best I could do would be to finish by Friday—tomorrow afternoon between 3 and 4.

The Court: That will give you full opportunity, then, to prepare the following Monday. [309]

Mr. Kay: Yes, your Honor.

Mr. Harrison: Doctor Haldeman.

KEENE O. HALDEMAN

called as a witness for the Respondent United States of America, being first duly sworn, testified as follows:

The Clerk: State your full name to the court.

A. Keene O. Haldeman.

Direct Examination

By Mr. Harrison:

Q. What is your occupation, Doctor?

A. I am a physician and surgeon specializing in orthopedic surgery.

Q. What does that specialty consist of, Doctor?

A. Consists of diagnosis and treatment of diseases and injuries of the bones, joints and muscles.

Q. And how long have you been in this specialty, Doctor? A. I have specialized since 1929.

Mr. Harrison: If the Court please, I believe your Honor is familiar with Dr. Haldeman's qualifications, and perhaps all of counsel are familiar. It

(Testimony of Keene O. Haldeman.)

might save time, or would you prefer I go into his education?

Mr. Magana: I will stipulate he is an orthopedist and qualified, if your Honor please.

Mr. Harrison: Thank you.

Q. (By Mr. Harrison): Dr. Haldeman, did you, at my request, [310] examine a man named Frank Luehr on or about November 26th, 1951?

A. I did.

Q. That was some 12 or 13 weeks ago, is that correct?

A. It was.

Q. With the aid of your notes, Doctor, could you summarize your findings for us?

A. The complaints which the patient made when I saw him on November 26th, 1951, included: First, a constant pain over the lower lumbar spine and around the lateral aspect of both hips, which pain was said to be worse in damp weather. Second, a draining sinus over the left tibia. Third, a shortening of the left leg. Fourth, limitation of motion of the left knee. Fifth, limitation of the left ankle. And, sixth, pain in the left ankle on walking.

My examination, in addition to a general physical examination, included those areas which were said to have been injured. From the history it appeared he had sustained a fracture of the left clavicle. Examination of the left clavicle was entirely negative except for a moderate tenderness over the upper border of the clavicle at its mid point.

Q. Excuse me, Doctor. The clavicle being the shoulder bone, is that correct?

(Testimony of Keene O. Haldeman.)

A. The collar bone.

Q. The collar bone? [311]

A. Examination of the left shoulder showed a normal range of motion in all directions except for a very slight limitation of abduction. That is, raising the arm from the side. This limitation was barely perceptible and measured at ten degrees.

The patient gave a history of fractures of the ribs, which diagnosis was confirmed by a review of X-ray films which I saw, which films indicated that the ribs had fully united. Physical examination of the ribs was entirely negative, there being no tenderness or pressure on pressure, and no pain in deep breathing, and the chest expanded normally without pain.

Examination was directed to the left leg. The patient walked with a cane, bearing partial weight on the left leg. There was a depressed scar four and one-half inches long over the anterior medial aspect of the upper third of the tibia. There was evidence of slight drainage of the lower two inches of this scar, which along this two inches was not fully healed. No bone could be seen in the unhealed portion of the scar.

The Court: Pardon me. What was the date of this examination?

A. November 26th.

Mr. Harrison: That was thirteen weeks ago, your Honor.

A. (Continuing): There were two scars on medial and lateral [312] aspects of the leg which

(Testimony of Keene O. Haldeman.)

had fully healed and represented incisions made to permit closure. There was no paralysis and no loss of sensation.

The fracture of the tibia appeared to be firmly united on testing.

There was no instability of the knee. That is, the ligaments of the knee appeared to be sound. There was slight tenderness over the middle of the tibia.

Measurements were made of the two legs to determine difference. The left leg was three-fourths of an inch shorter than the right. Measuring the circumference of the thigh showed the left thigh was one-half inch less in circumference than the right, and the left calf one-fourth of an inch less in circumference than the right.

Measurements of the knee motion showed normal extension on both sides. The right knee had normal flexion to an angle of 45 degrees, and the left had a slight limitation of motion, flexing to eighty degrees. The total range of motion was 135 degrees on the right and 100 degrees on the left.

Testing ankle motion showed five degrees limitation of dorsi flexion, carrying the ankle upward, and ten degrees limitation of plantar flexion. Total limitation of the left ankle was forty degrees as compared with a normal of fifty-five on the right. The motion of the joint beneath the ankle, pushing the foot from side to side, on the left, injured [313] side, estimated to be 20 degrees and on the right side 30 degrees.

(Testimony of Keene O. Haldeman.)

Attention was then directed to the back. He did not wear any support. The posture was poor, with increased dorsal kyphosis, which is a rounding of the spine, and the patient leaned slightly to the left. We call it a list to the left. The left shoulder was elevated one-half inch and the right hip bone was elevated about three-quarters of an inch.

Testing forward bending of the spine showed about two-thirds of normal range of motion and brought the fingers twelve and one-half inches from the floor, with a complaint on the patient's part of pain in the lumbar region. Bending back was estimated to be one-third normal, with complaint of pain in the lumbar region. Bending to the right, three-fourths normal and painless, and bending left was two-thirds normal with complaint of pain in the right lumbar region. Rotation of spine to either side was three-fourths normal and said to be painless.

There was moderate tenderness over the third lumbar vertebrae, that is, in the middle of the lumbar region. There was no spasm in the back muscles, and no disturbance of sensation.

Neck flexion, that is, bringing the chin down to the sternum forcibly, was negative. [314]

The Court: Pardon me. Did you have the benefit of X-ray pictures?

A. I have had a complete series of X-rays, yes, I did, your Honor.

The Court: All right.

(Testimony of Keene O. Haldeman.)

A. (Continuing): Neck flexion test was negative.

In cases of recent fracture of the spine, an unhealed fracture usually brings about pain at the level of the fracture. Straight leg raising could be carried through fifty degrees on either side, with complaint of pain in the lower back. That is, some limitation of straight leg raising. The crossed leg test, which is an evidence of low back derangement, was negative on both sides, and consisted of placing the one ankle on the other knee. The reflexes show knee jerks and ankle jerks were normal.

I reviewed X-ray films, as you asked, your Honor, which had been taken October 30th, 1951, at the United States Marine Hospital. Do you wish a description of such films?

Mr. Harrison: If you wish, your Honor, I have the films here if you would like to use the box. We can go over them, if your Honor likes. I think we saw quite a few yesterday.

The Court: The reason I was making the inquiry in relation to them, we had them here yesterday and I wanted to know if he had the benefit of examining those, that is [315] all.

A. I probably did not see the original films, but I saw the ones taken just before my examination, which showed the end result of the various injuries.

The Court: All right.

A. It is probably not necessary to describe those films in detail if they have been presented.

Mr. Harrison: No, I don't think so.

(Testimony of Keene O. Haldeman.)

A. My conclusions with regard to the patient were that he had sustained the following injuries: First, a fracture of the left clavicle, which had fully united without any resulting disability except for the very slight limitation of abduction of the left shoulder.

There was a history of contusions of the right leg, which had fully healed and of which there is no evidence at this time.

He sustained fractures of several ribs on the left and of at least one rib on the right, so far as I could determine from the recent X-rays, but it was evident all those fractures had healed, both by physical examination and X-ray films, and he has no complaint with regard to those ribs.

He also sustained a moderately severe compound fracture of the first lumbar vertebra, and the anterior height was diminished by 50 per cent. This vertebrae, the fracture of this vertebrae has fully healed. There is a solid bridge of [316] bone between the first lumbar vertebra and the one immediately below it on the anterior surface, which bridge of bone has doubtless formed as a result of the fracture and which tends to immobilize that fractured vertebra.

He sustained a compound fracture of the left tibia and fracture of the left fibula. The fracture of the left fibula did not unite, but that has no present importance because it was in the upper third where the tibia has united, but there has been a persisting

(Testimony of Keene O. Haldeman.)

sinus which, when I saw him, was only draining very slightly, and which drainage may be persisting because of a tiny piece of dead bone, the presence of which was suggested in the recent X-ray films.

The factor of disability which I found with regard to the left leg included the three-fourths inch shortening, which will be permanent; the relatively slight atrophy of the left thigh and calf, which atrophy I would expect to improve with continuing use; a limitation of motion with regard to the flexion of the left knee, which I would classify as of a slight degree, and which should improve with further use, although there may be a slight permanent limitation of flexion of the left knee; a slight to moderate limitation of motion of the left ankle, which I would also expect to improve somewhat with use; and a slight limitation of the subastragaloid [317] joint which is a joint of the foot, and which may also improve.

With regard to the back, he has certain limitations of spinal motion which I would expect to be permanent. I have listed the limitations of motion which I found and which may show some improvement, although some permanent limitation of spinal motion is to be anticipated.

The complaint of pain in the back I would expect to improve with continued bridging of the vertebrae and with passage of time.

The question of spinal fusion is to be considered. It is not my practice, as a rule, to fuse a fractured spine, because they usually go on through a steady

(Testimony of Keene O. Haldeman.)

course of improvement to a satisfactory function. Some people do fuse a fractured spine, which procedure may result in disappearance of pain.

Q. Doctor, you mentioned a three-fourths inch shortening of the left leg. Can that be corrected by some means such as an elevated shoe or heel?

A. Three-fourths inch shortening of the left leg isn't sufficient degree that one would carry out any operative procedure to equalize the leg. The shortening can be readily compensated to a sufficient degree by raising the left heel one-half inch and raising the sole of the left shoe one-fourth inch. Such a modification of the shoe is hardly visible to anyone [318] and would result in equalization of all but one-fourth inch in the shortening, and there is no disability from a shortening of one-fourth inch.

Q. Do you believe such a procedure would alleviate the pain in the back at all, Doctor?

A. I think that it might have some effect in relieving the back pain. A difference in leg length of three-fourths of an inch alone may be productive of low back pain; and a part of that low back pain, particularly the pain that is at a lower level than the fracture, may be due to the inequality of the leg length.

Q. Doctor, the patient in his testimony here has complained of pain in the region of his left hip. Was any such complaint made to you at the time of your examination?

A. No such complaint was listed or made to me. I will have to modify that. The fact is that he did

(Testimony of Keene O. Haldeman.)

complain of a constant pain in the lower lumbar spine and in the lateral aspects of both hips.

The Court: Pardon me, will you repeat that, Doctor?

A. He complained of constant pain over the lower lumbar spine and around the lateral aspects of both hips. That complaint of radiation of pain to the lateral aspects of both hips is a common accompaniment in low back pain, and I attribute it to low back derangement rather than to any direct disturbance in the hip joint itself. [319]

Q. (By Mr. Harrison): I see. Then, Doctor, other than the disability that arises from this leg and the back condition, is there any physical evidence that this man is not completely recovered from the other fractures which he sustained, such as the ribs and clavicle?

A. There is no such evidence.

Q. Would it be reasonable to assume that this man will be eventually able to dispose of his pain and walk about without too great difficulty?

A. I would think so.

Q. And do you think the man's injuries will prohibit him from doing some semi-sedentary work, or do you think he can make a useful citizen of himself?

A. I should think he can eventually perform many types of work. Possibly not that of his former occupation as a longshoreman.

Q. Do you think he could do the work of, say, a watchman or a guard, or something of the sort?

(Testimony of Keene O. Haldeman.)

A. I should think so.

Q. A gatekeeper? A. Eventually.

Q. Do you think he could safely travel to and from a job? A. He could.

Q. You say "eventually," Doctor. How long would you estimate this recovery is going to [320] take?

A. When I saw him on November 26th, 1951, I thought that he would be able to engage in some type of work within a period of three to six months. That conclusion was based on the assumption that an operation was soon to be performed to eliminate the drainage from the leg.

Q. And did you at the time you examined him, would you have recommended that that operation be performed at that time?

A. I felt that another operation should be performed to eliminate the drainage from the leg, and that there was no reason for delaying the operation further.

Q. I see. Doctor, if I understand that, you probably would not recommend a back fusion. Do you think that in the normal course of affairs, nature taking care of him, his back pain will be considerably reduced and possibly completely relieved?

A. I would expect a progressive improvement in the back pain, and it may be entirely relieved by time.

Mr. Harrison: Thank you, Doctor. I think that is all I have.

(Testimony of Keene O. Haldeman.)

Cross-Examination

By Mr. Magana:

Q. Doctor, in connection with the examination that you conducted of this man, I want to make certain things clear for the record, please. First, you saw him only the one time, did you not?

A. That is true. [321]

Q. All right. Now, that examination was what you medical men would classify as a complete orthopedic examination of the man, is that right?

A. It was.

Q. Second, in connection with your work, and again just to make it clear, you do not hold yourself out as a neurosurgeon nor as a neurologist, do you, sir?

A. I do not.

Q. All right. Then coming down to a few of the specific things in this case, let me understand you: One, there is a definite three-inch shortening of the left leg as compared with the right leg?

A. A definite three-fourths inch.

Q. Excuse me, of course, three-fourths of an inch shortening, is that right?

A. That is correct.

Q. That shortening that is present between the two lower extremities is accountable entirely, is it not, because of the impaction of the proximal end of the tibia with the distal end, is that correct?

A. We can assume that it is, although it is a known fact that normal men will frequently show variation of leg length of one-fourth to one-half

(Testimony of Keene O. Haldeman.)

inch. But assuming that he had equal length before, it would be due to the loss of some bone substance and the impaction of the fragments. [322]

Q. All right. Now, in addition to that, in measuring the man's legs—and by legs, I am going to use the entire lower extremity as such—you can also determine whether or not that individual carries the crest of his ileum at a higher level than the opposing side, can you not? A. You can.

Q. In this man's case, he does carry the crest of his right ileum, this hip bone, higher than he does the left, does he not?

A. I observed that the crest of the ileum was three-fourths of an inch higher than the crest of the left ileum.

Q. Does that also add in any way to the shortening or to the tilt that this individual has upon an observation?

A. It does not add to the shortening, it is a part of the shortening, because the length of the leg determines the height of the iliac crest.

Q. I see.

A. They co-exist, but one is not added to the other in determining the total shortening.

Q. All right. With reference to the question of this lumbar spine, as I understood it, you checked the records or the X-rays that the Public Health Service had submitted to you for examination, is that right? A. I did.

Q. That first lumbar spine, if I remember your

(Testimony of Keene O. Haldeman.)

testimony, was [323] crushed to about fifty per cent of its normal height, is that correct?

A. That was the compression of the anterior border of the vertebrae. It is a wedge-type of compression so that the anterior border was compressed fifty per cent. The superior border was compressed very little.

Q. All right. Was there anything else of significance with reference to that fracture that you observed?

A. My other observation was that a bridging bone extended from the first lumbar to the second lumbar, anteriorly.

Q. Now, if I may, Doctor, just diagrammatically for the moment, using just a block (drawing diagram on blackboard), in speaking of this vertebrae we are going to speak exclusively of the vertebral part, as such, without a laminae or the spinous process. You understand what I am saying?

A. I understand.

Q. Fine. Now, if we take, then, the first lumbar vertebrae and compare it with both the vertebrae above—I am going to call the upper one 12, the middle one 1, and the one below 2—that would represent the three vertebrae I have shown.

A. It would. [324]

Q. Assuming for the moment that this is a side view that we are looking at, a lateral projection rather than a front to a back view, and assuming that the word "F" represents the front or anterior portion. The spinal canal, of course runs behind

(Testimony of Keene O. Haldeman.)

these vertebral bodies, does it not? A. It does.

Q. All right. I am going to let that be represented by a couple of lines with the word "B" in back of it, and the spinus process just represented here by a couple of pseudo parallel lines behind it. As I understand it, the front of this vertebral body, as you remember it, was wedged down to about 50 per cent; right? A. That is right.

Q. The back of that vertebral body was approximately the same height as the corresponding body above and below?

A. That is probably true. Sometimes a little compression occurs of the posterior portion, and I cannot say with certainty in this case.

Q. All right. Whatever it is then, was this compression a compression, Doctor, that took place down, and by down I mean towards the level of the second lumbar, or was it a compression that took place more or less equally from the superior margin down as well as from the inferior margin up?

A. I do not recall.

Q. All right. Whatever it was, then and just arbitrarily [325] cutting this in half with a dotted line, I am generally diagrammatically showing with reference to the compression what you observed, is that correct? A. That is correct.

Q. All right. Now, in addition to that the other observation that you made from the X-ray was that at the time you saw these X-rays, which I believe were taken in October of 1951, there was evidence

(Testimony of Keene O. Haldeman.)

of bony bridging in the anterior margin between L-1 and L-2? A. That is true.

Q. All right. Now then insofar as general pathology and by pathology I am referring to bone pathology, of the first lumbar vertebra is concerned, have I indicated the important things that you observed on the radiographs?

A. You have actually—there is some disproportion in the sizes of the first and second lumbar vertebrae as you have drawn them, but I do not know that that is significant.

Q. No, it isn't intentional, it is just that I am not good at still life, Doctor. There we are now. I understood you to say that this vertebral body and what it represented on the X-ray would represent a moderately severe compression fracture, am I correct?

A. That would be my classification.

Q. All right. If then we go further, the fusion that has taken place between L-1 and L-2 is a desirable fusion, is it [326] not? A. It is.

Q. And that's one of the main reasons why you, as a preference or following your choice of procedure, would not recommend a spinal fusion operation at this time; is that correct?

A. It is one of the reasons. I believe that the main reason is based upon experience of myself and of others that the patient does about as well without the fusion.

Q. All right. Insofar, then, as this fracture is concerned, the fracture as you see it there is not

(Testimony of Keene O. Haldeman.)

affecting either the spinal cord or the nerve roots as they come from the spinal cord, is that correct?

A. That is my belief on the basis of the patient's symptoms, and on the basis of my physical findings.

Q. All right. Now, there is, of course, medically an entity which you medical men recognize called a spinal cord concussion, is there not?

A. There is such a condition.

Q. That concussion, however, has changes which are reversible so that even if you manifest a pathology originally you may recover from it, like you do from a concussion of the brain; generally is that so?

A. Theoretically that is possible; practically it isn't subject to proof, because you would have to take a piece of spinal cord out at the time of injury, which no one has done, [327] so that it is only theoretical when we talk about that.

Q. Fine; thank you. Then let us use the other word—there is an entity with reference to central nervous system involvement which is called a contusion, is that correct?

A. A contusion in reference to anything means a bruising.

Q. Yes. And if you start with the assumption that there has been a contusion, then if there is a bruising of the cord itself, the changes or the damage that is done is not reversible, is that correct?

A. You mean that healing cannot take place?

Q. No, even though healing may take place whatever scar tissue has formed on the cord will remain

(Testimony of Keene O. Haldeman.)

there if there has been a contusion; is that so?

A. If scar tissue has formed in the cord it will presumably remain there. The only fallacy about the whole argument at this point is that the spinal cord ends at the lower borders of the twelfth dorsal vertebra, usually, and below that it is a group of nerves referred to as the cauda equina. The spinal cord does not extend quite as far as the level of the fracture.

Q. Well, Doctor, as long as we are on that point, anatomically, according to Gray's Anatomy, or any anatomy book that we care to take, the spinal cord generally ends between L-1 and L-2, does it not?

A. That is not my impression. I believe that it ends about [328] the—between the 12th thoracic and the first lumbar. There is a variation in individuals. Beyond that termination it is continued as nerve—nerves.

Q. What you call the cauda equina, but in order to ascertain this proposition, whether it ends between L-1 and L-2, or at the 12th thoracic, we can go to any anatomy book and get the general consensus, can we not? A. We can.

Q. I have one here, I will refer to it in just a moment. In reference to this fracture then of the first lumbar vertebra, if the vertebral body itself is damaged and is displaced into the spinal canal, into the space occupied by the spinal canal as such, then of course that adds another factor into the pathology in this case, does it not?

A. If it is displaced into the spinal canal at the

(Testimony of Keene O. Haldeman.)

time of injury, one would anticipate evidence of nerve lesion, such as paralysis below that level, loss of rectal and bladder control, and loss of sensation. So far as I know, those evidences of spinal cord injury were not present.

Q. All right. Now, doctor, you mentioned something about the spinal cord ending at a certain level. Even if—let us take a vertebra where there is no question about it, let us take the third lumbar vertebra. Even if the third lumbar vertebra were to protrude back into the canal and impinge upon the cauda equina, he could still get the symptoms of cord [329] paralysis that you have just described, could he not?

A. You can get these various paralyses from an injury to the cauda equina.

Q. All right. Now, that is because that is still part of the central nervous system, isn't that so?

A. It is.

Q. Now, in this case on the examination of the X-rays that you had before, Doctor, did you observe whether or not there was any displacement into the spinal canal?

A. That I can only answer by looking at those particular X-rays.

Q. Well, before I show you that let us go this far. If there has been—one centimeter is two-fifths of an inch? A. Approximately.

Q. If there has been a displacement of two-fifths of an inch to one-half inch into the spinal canal, that is a marked displacement, is it not?

(Testimony of Keene O. Haldeman.)

A. That depends on the level at which the displacement occurs and the total width of the canal at that level. I mean, it isn't measured in terms of centimeters, but measured in terms of proportion of the canal which is narrowed.

Q. All right. Whatever it is, if there has been a displacement of two-fifths to one-half inch into the spinal canal at the level of L-1, just below T-12, below the twelfth [330] thoracic, you would observe, looking at the X-ray you would say that there has been a definite displacement into the place where the spinal canal should be, would you not?

A. There has been—there would, in that case, be a displacement into the spinal canal. I should point out that there is ample room in the spinal canal for the passage of nerves and even of the spinal cord.

Whether or not compression of those structures occur would be determined by clinical manifestations, such as paralysis, loss of sensation and loss of bladder and rectal control. It isn't a question of looking at a space and saying is that cord compressed, it is a question of what is the clinical evidence of compression.

Q. Let us go at it step by step. One, if you look at an X-ray, you can make the observation whether it is displaced or not, at least from the X-ray point of view, can't you?

A. When you say "it" referring to the vertebra?

Q. The vertebra. A. You can, yes.

Q. You can say it is displaced posteriorly if it

(Testimony of Keene O. Haldeman.)

is, or if it shows upon the lateral X-ray?

A. You can.

Q. All right. Number two, if you want to determine whether a person has had cord symptoms or not, and you are in the position of the examining doctor, examining the one time, you [331] can by reference to the hospital records determine whether or not the individual had, one, sphincter paralysis; two, incontinence of the bladder; three, paralyses of the lower extremities; can you not?

A. Those facts should appear in the hospital records.

Q. All right. If they do appear in the hospital records, and if the treating doctor observes those things in the hospital records, then you again, relying on the history in order to make a diagnosis would then say that there has been at least some pressure on the cord; is that correct?

A. In the event those findings were present there would be evidence of either contusion, which you mentioned, or the appearance of edema, which is an increase in fluid in the cord and nerves resulting from the injury, there would be assumed to be some temporary damage of the nerve tracts.

Q. All right. Now, Doctor I want you, if you will—

The Court: We will take a recess now and give you an opportunity to examine them.

(Short recess.)

Mr. Magana: Your Honor, I would like to mark in evidence as libellant's next in order a lateral view

(Testimony of Keene O. Haldeman.)

that Dr. Haldeman was kind enough to provide.

Mr. Harrison: No objection, your Honor. That was taken at the United States Marine Hospital.

The Clerk: Libelant's Exhibit 37 admitted and filed [332] in evidence.

(Thereupon the X-ray above referred to was marked Libelant's Exhibit No. 37 and received in evidence.)

Q. (By Mr. Magana): Before we show this particular exhibit to the Court, Doctor, obviously Mr. Luehr neglected to tell you about any cord symptoms that he may have had, did he not?

A. He did.

Q. Otherwise—and usually when they have these things, you expect, as an examining physician, to have them tell you about what they have gone through so that you can put it down, on a record, isn't that so? A. That is true.

Q. All right. Now, if I may, I will turn this around there, and would you put this in the box for the Court?

The Court: Exhibit what?

Mr. Magana: Libelant's Exhibit No. 37, your Honor.

Q. Now, we are, of course, looking at a lateral view, are we not? A. We are.

Q. And just for the record so there is no mistake about this, the anterior bridging that you speak about is demonstrated here where I am pointing with a pen; correct? A. It is.

(Testimony of Keene O. Haldeman.)

Q. There is no bridging, however, that you observe at the posterior margins of the vertebral body, is there? [333] A. There is not.

Q. And can you tell by looking at this picture whether the articular facets, if any, have been damaged?

A. Although one cannot see the articular facets at this level, because of the plane in which they lie, I would expect some damage from that type of displacement.

Q. All right. Now, in addition to what had previously been described, Doctor, there is no question whatsoever but that there has been a definite displacement into the spinal canal of the posterior body of the vertebra? A. That is true.

Q. All right. Now, let me ask you, the picture that is demonstrated there—incidentally, the first lumbar vertebra is one of the vertebral bodies that is commonly compressed in an accident, is it not?

A. It is.

Q. And that is because that is the place where there is the greatest amount of flexion or movement in the spine other than at the neck, is that so?

A. It occurs at that level because it is the junction of the movable part of the spine, which is the lumbar, with the relatively immovable part of the spine, which is the dorsal.

Q. Fine. Now, in this particular film, Doctor, I want to show you a front to back view here, this front to back view was taken the day of the acci-

(Testimony of Keene O. Haldeman.)

dent, July 28 of 1950, and is [334] Libelant's Exhibit 3-I. Would you put it in the box?

There is no difficulty, of course, locating L-1 in that view, is there?

A. It is readily seen because it is the first vertebra below the ribs.

Q. All right. Now, I want you—I am going to call your attention to what appears to be a portion of decreased density, a black portion in there; what is that, Doctor?

A. It is probably a fracture of a lamina of the first lumbar vertebra.

Q. Now, so that there is no question about it being a fracture of the lamina, let me show you Libelant's Exhibit 30, which is taken on March 15 of this year, Doctor.

A. The line formerly seen in this area, (indicating) is no longer visible.

Q. All right. So if we then, Doctor, using this example, which is just an ordinary skeleton, and using it as an illustration, we know that the front body of this vertebra was crushed; that is observable, is it not? A. It is.

Q. We also know that between the first lumbar and second lumbar over the months since the accident there has been a fusion, a connection between the two vertebrae; right? A. There has.

Q. We also know that the lamina in this accident was [335] fractured. Would you show the Court and point to the lamina?

(Testimony of Keene O. Haldeman.)

A. The lamina is this portion of the vertebral body.

Q. All right. And this gives us a pretty general idea as we look at it closely, of what the skeletal spinal canal or a neuroarch looks like, is that correct? A. It does.

Q. All right. Would you be seated, then, Doctor?

Now, with reference to any injury to the back, forgetting for a moment any injury to the central nervous system as such, the cauda equina or the brain, there is also in any back case where there are complaints of pain, possibilities of damage to the nerve roots, or what you men call the peripheral nerves, is that correct? A. It is.

Q. Now, with reference to these nerves or the peripheral nerves, let us take the level at L-1, the first lumbar vertebra. One of the first signs, neurological signs, of damage or of injury to a root is pain at the particular level, is that correct?

A. Pain occurs at the level of fracture probably not due to nerve root involvement, but to actual damage to the vertebra and joints at that level. Pain is certainly a common accompaniment of any fracture of the spine.

Q. All right. If this fracture, while we are on this, if this fracture was sufficient to compress the vertebra, to force [336] it back and to break the lamina at the place where you have indicated, can you tell us, Doctor, whether or not it is reasonably certain to damage the ligaments, like the ligamentum flavum that line the neuro canal?

(Testimony of Keene O. Haldeman.)

A. I should think at least the posterior longitudinal ligament would be damaged.

Q. All right.

A. Not necessarily the ligamentum flavum, which is the posterior side of that canal.

Q. All right. As far as a ligament is concerned, if a ligament is damaged it may calcify over a period of time, is that correct? A. That is true.

Q. And in connection with any of these injuries there is an entity known as traumatic arthritis, is there not?

A. There is such a term about which a great deal of discussion has been carried out.

Q. Whatever it is, as these bony spurs form or as the calcium settles on ligaments, that may produce an area of irritation, is that correct?

A. That is true.

Q. Now, with reference then to this man's spine I notice by your testimony that you have never indicated previously that there was a posterior displacement of the vertebra. Didn't you think that was of importance, Doctor, or was it an [337] oversight?

A. It was an unintentional omission of the description.

Q. Of course. However, a parallel displacement would be certainly more significant than if there had been compression without posterior displacement; right?

A. It would be more significant in explaining the symptoms and physical findings immediately

(Testimony of Keene O. Haldeman.)

after the injury. I am not sure that it has any present significance with regard to present complaints.

Q. All right. As far as the vertebral bodies are concerned, each vertebra does move on the facets, does it not? A. It does.

Q. Now, you, at the present time, do you know whether any fusion has taken place at the facets between L-1 and L-2, do you? A. I do not.

Q. All right. Then will you tell us this, Doctor: Isn't it a fact that between each of these vertebral bodies there is of course, a thing commonly referred to as a disc, is that so? A. That is true.

Q. With damage of the severity that you observed on the first lumbar vertebra, can you tell us whether or not in your opinion it is reasonably certain that there has been damage to the cartilage surrounding the disc at the level between L-1 and T-12 and L-1 and L-2? [338]

A. I would assume that some changes have resulted in the fibral cartilaginous ring of the disc.

Q. All right. Now, it is true, is it not, that a disc may protrude over a period of time sufficiently to impinge or to press upon the cord itself, is that right?

A. That is a general statement of fact. In this particular case I believe there is good reason, from the lateral view, to assume that the disc cannot protrude laterally—cannot protrude posteriorly because of the position of that displaced first lumbar vertebra. I could illustrate by showing you on the lateral view what I mean.

(Testimony of Keene O. Haldeman.)

Q. Let me put it to you this way: You mean because it has wedged back into the canal?

A. It has wedged back and overhangs a little where the disc is so that is one thing that I do not think is apt to occur in this man.

Q. Although we have at the present time presently and existing bone in the space where previously there were the coverings and the ligaments for the spinal cord; right?

A. Bone has projected, namely, the first lumbar vertebra back into the space of the spinal canal, a part of which space is occupied by the lower end of the spinal cord and the nerves attached thereto.

Q. All right. I will make it fast, Doctor, so that I won't hold you. Let me just put one other thing up to you. It, the [339] lumbo-sacral—put it another way.

This man is complaining of radiation of pain down the back, the posterior aspect of the left thigh. That is a classical sciatic distribution of pain, isn't it?

A. Well, in the case, in his complaint to me he said it went down his lateral aspect of both hips, and it isn't—not applies to sciatic in that he did not complain of radiation down the leg as far as the knee or calf. Usually sciatic goes clear down the leg, even into the foot.

Q. Doctor, whatever it is, the nerve——

A. It is some nerve.

Q. Well, the nerve that goes down the back of

(Testimony of Keene O. Haldeman.)

the leg as far as the back of the knee is a portion of the sciatic nerve, is that right?

A. The sciatic nerve does go down there, yes.

Q. And that sciatic nerve, among other places, emanates from the lumbo-sacral joint, is that true?

A. That is true.

Q. Now, as far as the lumbo-sacral joint is concerned, Doctor, I don't imagine you had pictures taken, did you or did you not observe any pictures of it?

A. It is shown in the lateral view of the lumbar spine, which was reviewed.

Q. Okay. As I say, I am trying to hurry this so I won't delay you. [340]

I am going to put Libelant's Exhibit 29 in the box. There is no question but that the posterior section of the lumbo-sacral joint is markedly narrowed, is that correct? A. That is true.

Q. All right. Now, Doctor, in connection with your examination I understood you to say that the ununited fracture of the fibula at the upper end was of little significance because it is not weight-bearing; am I correct? A. That is correct.

Q. However, if there had been a fracture of the tibia down at the distal end, that would be of significance, wouldn't it?

A. You mean a fracture of the fibula?

Q. Fibula, that is what I mean.

A. It would be of significance, of greater significance.

Q. I didn't understand.

(Testimony of Keene O. Haldeman.)

A. It would be of more significance than the upper one.

Q. All right. And that is because of the ankle joint movements, is that correct? A. It is.

Q. Now, you didn't get any history of a fracture of the fibula at that end, did you? I don't think you did. A. I think not.

Q. All right. Let us look at it very quickly then, Doctor. Going to put Libellant's Exhibit 3-F, taken the day of the accident, the left leg. There is just no question about the [341] fracture being there, is there?

A. There is a fracture involving the lower third of the left fibula.

Q. Now, so far as that fracture is concerned, I have another shot here, but I am not going to take the time to show it. If that hasn't united even to this date, and if the individual complains of pain on the outside of the leg as he proceeds to walk, would it be attributable in any way to the ununited fracture, if there is one?

Mr. Harrison: Your Honor please, I think the Doctor is certainly entitled to know that the fracture at the lower extremity has united.

Mr. Magana: I will look for it; I will look for it. [342]

Mr. Harrison: I believe it is a matter of record. Dr. Walker testified it had united satisfactorily.

Mr. Magana: Mr. Harrison, I have tried to look over the record. If that is the record, if that is your conclusion, there is no remark for me to discuss.

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(Testimony of Keene O. Haldeman.)

Q. (By Mr. Magana): All right, let's look at this. Let's see what it says here. I am going to put up libelant's Exhibit 21, Doctor, and so there is no mistake about it, I am reading from March 15, 1950, am I not?

A. (Going to shadow box): You are.

Q. That is a front to back view, is it not?

A. It is.

Q. Does that look united?

A. From the front view it looks united.

Q. But you can't conclude from just one view, can you, Doctor?

A. I would like to see a side view.

Q. Certainly. Let's take a look at libelant's Exhibit 22.

The Court: Taken when? Same date?

Mr. Magana: Same date, March 15th.

A. In the side—well—oh, yes, this is also a front view, which looks united.

Q. Down at the distal tip, is that right?

A. Yes.

Q. Whatever it is, the union that appears is the union you [343] see on this photograph, is that correct—on this radiograph?

A. In that film it looks united.

Q. I haven't time to look for the other one. Would you resume the chair, please?

(Witness resumed the witness chair.)

Q. (By Mr. Magana): Also, as I understood, this man did not complain to you of the right ankle,

(Testimony of Keene O. Haldeman.)

is that so? A. He did not so complain.

Q. I am going to show you libelant's Exhibit 3-C, taken the date of the accident. Will you step down and look at it? Now, looking at the astragalus, does that appear to be any type of pathology?

A. (At shadow box): There is a loose piece of bone lateral to the astragalus which could represent a recent fracture or an old fracture, I could not tell which.

Q. All right, let's take a look at March 15th of 1952, libelant's Exhibit 20, also of the right ankle.

A. To keep it in the same direction (changing film on shadow box), the fragment of bone is still seen.

Q. What about the medial side, Doctor?

A. On the medial side there is a separating piece of bone. Whether it represents old fracture or congenital condition I could not tell.

Q. Well, whatever it is, if it was congenital you would expect to see it on the first view, would you not, the one taken [344] July 28th of 1950?

A. A comparison of the two films would make me think that it is newly formed bone, probably in a ligament of the ankle.

Q. Representing an irritated process, Doctor, that is continuing in this man's case?

A. I am not sure.

Q. All right. I have just a couple more questions, Doctor. Here is an X-ray taken the 29th of October of the year 1951, libelant's Exhibit 31, both the right and left hips appear normal, don't they?

(Testimony of Keene O. Haldeman.)

A. The hip joints are normal. There may be a little less calcium in the upper end of the left femur than is present in the right.

Q. But of course the contour of the bones, the head of the femur and the acetabulum—is that what this is? A. It is.

Q. That looks to be all normal, doesn't it, Doctor? A. Essentially normal.

Q. Let's take a look at one just a few months later, libelant's Exhibit 32, taken also by the treating doctor. It is easy to find which is the right and which is the left, isn't it, Doctor? It is mentioned on the X-rays? A. Yes, this is the left.

Q. Doesn't look the same, does it? [345]

A. I would not say that there is any significant difference. The obvious difference is an appearance of hollowing out at the head of the femur, seen in the more recent film, which is not seen in the earlier one. But that is an anatomic structure called fovea, which I believe is visible here because of a difference in rotation of the hip joint at the time the film was taken.

That is shown by the greater trochanter appearing in the recent film farther out than it does in the earlier film, in which the greater trochanter overlies the head. In this case it is way out here, which means you are looking at a different circumference, horizon of the head of the femur; and we commonly see that depression or fovea in certain positions. I do not think that particular condition represents a pathological change.

(Testimony of Keene O. Haldeman.)

Q. You do see demineralization?

A. There is some demineralization still visible at the upper end of the right femur—left femur, correction.

Q. All right. Now, Doctor, finally some time ago, and I believe—when was your report written?

A. My report was written November 27, 1951.

Q. At that time you felt that in three to six months this man could do a light type of work, is that right? A. That is right.

Q. All right, that would be December, January, February—[346] we are almost through the fourth month?

Mr. Magana: Mr. Luehr, would you walk up here, please? And I wish you would observe him, Doctor.

Mr. Harrison: May I remark the doctor's testimony was that if the leg operation had been performed at that time, he then felt within three to six months. The leg operation has not been performed for some unknown reason.

(Libelant arose and walked toward the witness.)

Mr. Magana: That is all, Mr. Luehr, thank you.

Q. (By Mr. Magana): When you examined him, the man was cooperating with you in every way, wasn't he? A. He did.

Q. There was no question about his cooperation? You didn't feel he was trying to stretch anything, did you? A. I did not feel so.

(Testimony of Keene O. Haldeman.)

Q. Do you still feel at this time, Doctor, at the end of three to six months—I will withdraw that. Do you still feel at this time he will be able to do any light type of manual labor at the end of six months from this date?

A. He might six months from the present date.

Q. And do you feel, then, Doctor, so that I understand your testimony fully, that the only thing remaining to be done for this man, surgically or medically, is the operation on the tibial bone as such?

A. That is one operation that should be performed. I would [347] not take issue with a surgeon who felt that a spinal fusion should be done. I want to make the point clear that there are good surgeons who advocate such an operation, and I would not say that they are wrong to do it. I merely said that in my experience it was not necessary in the average case.

Q. All right. Now, Doctor, when you wrote—I will withdraw that. So far as this sequestrum of bone in the infection, as such, that is not producing any pain to Mr. Luehr, is it?

A. I think not. I think its effect is causing the slight drainage to persist.

Q. All right, that standing alone is not causing Mr. Luehr to limp, is it?

A. I should think not.

Q. Then when you gave the opinion—and I am referring now to the objection by Mr. Harrison that you heard—when you gave the opinion that this

(Testimony of Keene O. Haldeman.)

man would be ready from November to return to work in three to six months, you did not feel at that time that the operation for the leg or that the leg condition with reference to the sequestrum of bone had anything to do with reference to his prognosis?

Mr. Harrison: I object to that, your Honor. Mr. Magana refers to the man returning to work. The doctor has not testified the man could return to work as a stevedore. In [348] his direct examination he said he would be limited to semi-sedentary work. Mr. Magana asked if he could return and do light manual labor.

The Court: I think we are all agreed he is not in condition to engage in anything, only light work. I think that is accepted by everybody. However, you may answer the question. Read the question.

Mr. Magana: I will reframe it quickly.

Q. (By Mr. Magana): When you said he could return to work in three to six months, whatever work he did return to, light or otherwise, you had in mind that this operation was not contributing to his pain nor to his inability to move, is that correct?

A. Well, as you phrase the sentence, you said that the operation was not contributing to his pain nor his inability to move. I don't think you meant that. I think if you mean was that little sequestrum and that little draining sinus contributing to the pain and inability to move, I would say that they were not.

Q. That is what I mean. So that when you say in three to six months period he would be able to return to a light type of work, you meant that

(Testimony of Keene O. Haldeman.)

whether this healed spontaneously, the drainage, or whether he had to have an operation?

A. I meant that, for one thing, if he had to have the operation he should have it before he talked about going back [349] to work. In other words, he isn't going back to work while he is undergoing surgical treatment.

Mr. Magana: All right, that is all.

The Court: Any other questions, gentlemen?

Mr. Harrison: I don't think so, your Honor.

The Court: Just a moment, Doctor. I took time off yesterday to pay the doctor that appeared yesterday a compliment. I am going to ask you to make some observation in relation to this witness.

Mr. Magana: I will, your Honor. I think he is a very fair witness in the way he answered the questions.

The Court: Any disagreement?

Mr. Kay: We are all joined in that, your Honor.

The Court: All right, Doctor.

(Witness excused.)

Mr. Harrison: Your Honor, please, perhaps by way of explanation, I would like to either ask Mr. Kay for a stipulation on this or state this as a fact to the Court, that Dr. Walker made periodic reports to the Firemen's Fund Insurance Company concerning this man's progress, and the reason that Dr. Haldeman was not advised of these cord symptoms is that in Dr. Walker's reports to the Firemen's Fund Insurance Company there is no mention of any of

(Testimony of Keene O. Haldeman.)

these symptoms. I think Mr. Kay has read the report and will stipulate to that. At least in the August 1st, 1950, which [350] is the only one I have seen.

Mr. Kay: I haven't read them, but if Mr. Harrison states it is so. I gave both sides a copy of the report so that they would be fully advised.

Mr. Harrison: And it might explain why Dr. Haldeman was rather unprepared, the original examination Dr. Haldeman gave Mr. Luehr was purely preliminary, and when I realized we were going to trial in this case I asked Mr. Resner for further medical examination, which he refused.

Mr. Resner: You will recall, Mr. Harrison, at the outset of this trial we offered to submit Mr. Luehr to any doctor the Court or counsel cared to make.

Mr. Harrison: I just make that statement by way of explanation.

Mr. Resner: And we still make the offer.

The Court: I say this advisedly: We had two doctors here and I tried if possible, within reasonable limitations, to follow the testimony, and there isn't very much disagreement as I see it.

Mr. Harrison: I don't believe so, your Honor. I make this statement merely by way of explanation why Dr. Haldeman wasn't perhaps better prepared to testify.

The Court: It is 12 o'clock now. We will take an adjournment until two o'clock.

(Thereupon this cause was adjourned to the hour of two o'clock p.m. this date.) [351]

March 20th, 1952—2:00 o'Clock P.M.

Mr. Harrison: Your Honor, please, before opening the Government's case on the facts, I would like to take this opportunity to refresh or to restate the Government's position in this matter, since Mr. Resner and Mr. Kay have taken every opportunity to argue their interpretation of the Government's position and they have successfully, in my opinion, misconstrued or misstated it; and I would like to take this opportunity to make a very short statement of what our position is in this matter.

It is our position, your Honor, that, specifically with reference to these walking boards or scaffolding which we have suggested might have been used, it is not our position that had the man been under the airplane on scaffolding or walking boards, the injury would have been avoided.

It is our position that had walking boards or scaffolding been available, it would not have been necessary for the man to go under the airplane to perform the job which he was to do. Mr. Luehr has testified that he was there solely for the purpose of steadying the airplane. On recross-examination yesterday he said he was not there to adjust the platform, nor was he there to put the bolts into the landing gear that secured it to the platform. [352] He was there solely for the purpose of steadying the airplane.

It is the Government's position that the steadying job could have been done without going beneath the airplane, had there been a place for Mr. Luehr to stand elsewhere than under the airplane.

Now, Mr. Kay and Mr. Resner both have made much of the fact that had there been walking boards and Mr. Luehr had been under the airplane he would have been crushed. That is not our argument at all. Our argument is that had there been walking boards he would not have been under the airplane to perform the job of steadying it.

With that I would like to call my first witness. Mr. Mogan, will you please take the stand?

MATTHEW C. MOGAN

called as a witness for the respondent, U. S. A., being first duly sworn, testified as follows:

The Clerk: State your full name to the Court?

A. Matthew C. Mogan.

Q. (By the Court): Where do you reside, sir?

A. San Francisco, sir.

Q. What is your position and occupation?

A. I am general pier superintendent for the San Francisco Port of Embarkation.

Q. How long have you been so engaged? [353]

A. A little better than ten years.

Q. Prior to that time, what did you do?

A. I worked for the Hawaiian American Steamship Company for seventeen years as an assistant pier superintendent.

Q. And your present occupation is what?

A. General pier superintendent.

Q. What are the duties of a general pier superintendent?

A. Over-all supervision of cargo operations on

(Testimony of Matthew C. Mogan.)

piers controlled by the Army, or contract piers under contract to the Army.

The Court: Proceed, counsel.

Direct Examination

By Mr. Harrison:

Q. Then, in your capacity as pier superintendent, Mr. Mogan, are you familiar with the fact that a man was injured in July of 1950 while planes were being loaded aboard the S.S. Shawnee Trail?

A. Yes, sir.

Q. And you are also aware that the Army derrick barge B.D.-3031 was alongside the Shawnee Trail assisting in that loading operation?

A. Yes, sir.

Q. Will you give us, just for the education of all of us, Mr. Mogan, a brief resume of the arrangements that were made to have this barge alongside the Shawnee Trail, and the [354] standard operating procedure for making such arrangements when it is required?

A. Well, the main job, you might say, is to order Army cargo to the port that is destined for overseas bases, and we do use our own facilities at the Oakland Army base, and also use other facilities which are under contract.

At Alameda, that was formerly operated by the air force as a loading place for airplanes. These thirteen planes which were arranged to be loaded on this particular vessel were ordered into Alameda for loading. Likewise, the ship had no particular

(Testimony of Matthew C. Mogan.)

gear, so we had to have a barge in order to do the loading. Inasmuch as the Army has their own heavy lifting gear, we ordered the barge over there to perform this work.

Q. What are the details of that arrangement? Who decided the barge must go alongside?

A. Of course we have the barge. It is owned by the Government. It is just more a matter of economy to use their own barge rather than go out and hire a commercial barge.

Q. In this particular instance, you are aware the Jones Stevedoring Company was doing the stevedoring?

A. They perform all the work for the Army on outside piers. We instructed Jones Stevedoring Company to place the gang of longshoremen there to perform the actual loading operation and the Government furnished the heavy lift barge. [355]

Q. Once this derrick is alongside the vessel that you are to load these B.D.-3031's on, once it is alongside the vessel, are there any further instructions given to the barge foreman from your office?

A. Always during a plane loading operation there is a representative of the United States Air Force there who lays out the plan beforehand as to the exact location the planes are to be placed. He likewise instructs the Jones Stevedoring Company walking boss where he wants the planes placed, and the Jones' walking boss will give the instructions to the signal man of the derrick barge as to when he wants it lifted to raise it in position. All

(Testimony of Matthew C. Mogan.)

employees on the barge being Government employees, of course.

Q. Once the barge is alongside and they are ready to load, Jones takes over the operation?

A. He is the stevedore doing the actual loading of the cargo.

Q. To your knowledge does any other department of the Government direct the operation once it is alongside that vessel?

A. I don't understand the question.

Q. You mentioned that Mr. Rosenstock, the air force representative, is present, and you say he merely tells Jones' foreman where he wants to put the airplanes?

A. That is correct. [356]

Q. Does Mr. Rosenstock or any other army officer or Government official direct the derrick operation, that is, the actual lifting?

A. That is supposed to be——

Mr. Kay: Just a moment. We object to this line of testimony on the ground that no proper foundation has been laid. There is no showing this witness was there to observe any of these things.

Mr. Harrison: I am just asking general knowledge. I will withdraw the question, your Honor.

Q. (By Mr. Harrison): Are you familiar with the contracts which the Government makes with the contract stevedores in a general way?

A. From an operative standpoint, yes, sir.

Q. Do you know, under the contract, who provides walking boards, slings, dunnage, and other things?

(Testimony of Matthew C. Mogan.)

Mr. Kay: I object to that on the ground that the contract is the best evidence, your Honor.

Mr. Harrison: I am merely doing this—the contract is a very long document.

The Court: Well, the phase of it you have in mind, read from the contract and ask if he is familiar with it and spell it out.

Mr. Harrison: All right, I will do that, if you will bear with me while I dig through it here. Well, perhaps we [357] can avoid all this with another question, your Honor.

Q. (By Mr. Harrison): Is it your general practice to have available for contract stevedores walking boards, slings, dunnage, and other accessories?

A. We have two types of contract as far as stevedoring is concerned. At the Oakland Army base we furnish all the gear required in connection with stevedoring operations. At outside piers, particularly in the case of Jones, they furnish their own equipment.

Q. I see.

A. However, had request been made for walking boards, I presume we would have furnished them.

Q. I have now found the specific provision in the contract which was in effect at this time, which has been pleaded as a matter of record in this Court, your Honor. There is a section entitled, "Section 1," which I assume is a subsection of Article 1, which states:

"Gear supplied by the contractor"——

(Testimony of Matthew C. Mogan.)

Mr. Kay: Pardon me, Mr. Harrison, what page of the contract is that on?

Mr. Harrison: A.P.-6-3-1.

Mr. Kay: Under Article 1?

Mr. Harrison: 1-I. It states:

“The contractor shall perform an efficient stevedoring operation, and to this end will furnish, [358] at its own expense, all necessary and proper gear, including the following: Ammunition gear when handling ammunition, roller conveyors, hooks, cargo nets, save-all nets, rollers, skids, machinery, dollies, chain slings, platform slings, wire and rope slings, heavy lift slings used in connection with heavy lift cranes, trailers, hand and four-wheeled trucks, pipe trucks, hatch and rain tents, pallets.”

Q. (By Mr. Harrison): To the best of your knowledge, is that the provision of the contract?

Mr. Kay: Just a minute, that isn't—we object to this line of questioning. This contract speaks for itself. We admit that that is the contract we had with the Government, and this witness is being asked to merely corroborate or verify what is in the contract.

Mr. Harrison: I was trying to facilitate bringing it to the Court's attention, your Honor.

The Court: Very well, proceed.

Mr. Harrison: I believe that is all I have from this witness, your Honor.

The Court: Any questions, gentlemen?

Mr. Resner: I have no questions from the gentleman.

(Testimony of Matthew C. Mogan.)

Mr. Kay: I just have a question, your [359] Honor.

Cross-Examination

By Mr. Kay:

Q. Are you familiar with all the provisions of this contract? A. Yes.

Mr. Harrison: I object on the ground the contract is the best evidence.

Mr. Kay: I didn't ask him about it. I just asked if he was familiar with it.

Mr. Harrison: He already stated he was.

Mr. Kay: Did he?

Mr. Harrison: Yes, I asked if he was and he said yes.

Q. (By Mr. Kay): Is that your testimony?

A. I said from an operative standpoint I am familiar with it. However, I am not the contract officer of the San Francisco port of embarkation and I do not participate in writing the contract.

Q. What is that?

A. I do not participate in writing the contract.

Mr. Kay: That is what I was pretty sure was the situation. Thank you.

The Court: You have enough to do without taking on any more tasks, isn't that right?

A. I think so, Judge, particularly in these days.

The Court: Any more, gentlemen?

Mr. Kay: No, your Honor.

(Witness excused.) [360]

Mr. Harrison: I would like to call Mr. Max Rosenstock.

MAX ROSENSTOCK

called as a witness for the respondent, U. S. A., being first duly sworn, testified as follows:

The Clerk: State your full name to the Court.

A. Max Rosenstock—R-o-s-e-n-s-t-o-c-k.

Q. (By the Court): Where do you reside?

A. San Francisco, sir.

Q. What is your address?

A. 1286 O'Farrell Street.

Q. What is your business or occupation?

A. Air Force loading technician.

Q. Loading——

A. Technician. On planes.

Q. What is the nature of the activity? I don't know very much about it.

A. Make plans where a plane should be spotted. If the stevedore has trouble hooking up the bridle, I explain the way it should be hooked up.

Q. You are employed by who?

A. The United States Air Force.

Q. How long have you been so engaged?

A. Nine years.

Q. Prior to that time what was your occupation? [361]

A. I was in business for myself, in the fur business.

The Court: All right.

(Testimony of Max Rosenstock.)

Direct Examination

By Mr. Harrison:

Q. You had this job, then, on July 28th, 1950?

A. That is right.

Q. The job you have just described. Do you recall where you were on July 28th, 1950, Mr. Rosenstock?

A. Right there on the Shawnee Trail.

Q. Then you are familiar with the fact that a man was injured during that loading operation?

A. Right, sir.

Q. Can you tell us what you saw of the accident?

A. I couldn't say exactly what happened to the man. I know the plane dropped about three feet, and then I heard a man scream, and that is all I know of it.

Q. Where were you standing?

A. Right on the catwalk, near the plane.

Q. Do you know where the man was?

Mr. Kay: Just a moment. He said he could not see the man or could not say much about the man.

Mr. Harrison: He said he didn't know what happened to the man, I believe.

Mr. Kay: May I have that read back?

The Court: Certainly. Read the last two questions and [362] answers, Mr. Reporter.

(Questions and answers read by the Reporter.)

(Testimony of Max Rosenstock.)

The Court: Let the question and answer stand. Proceed.

Q. (By Mr. Harrison): Can you tell us what you saw of the accident in general from your position on the catwalk? Were there other men under the plane or near the plane?

A. There were quite a few men near the plane.

Q. What were they doing?

A. Taking the plane off the crane, put them on stands, which I have a picture of those planes. We put the plane on the stand.

Q. At this particular time did you give any orders or directions to Mr. Cates, the barge foreman, or Mr. Bailey, the crane operator?

A. No, sir.

Q. Who was giving these men their orders?

A. Mr. Ted Spirz.

Q. Mr. Rosenstock, we have a model of this mechano deck over there. Can you tell us, just estimate, how far apart the port and starboard beams are—port to starboard beams? Do you know?

A. It all depends how the ship comes in. We have to go in according to the position of the plane.

Q. Those are the fore and aft beams that are moveable. I am talking about the thwartships. [363]

A. About ten feet.

Q. About ten feet apart? A. Right.

Q. Does that accurately represent the fact that there is considerable space between the beams when they are spread out? A. That is right, sir.

(Testimony of Max Rosenstock.)

Q. Were the stevedores who were steadying these planes—where did they stand when they are doing this operation?

A. A few of the men were in front of the plane, right at the nose gear, and a couple of men at the after end of the plane.

Q. Were they standing on the main deck or beams? A. On the beams.

Q. Any men on the main deck?

A. No, except Mr. Spirz was on the catwalk.

Q. Do you know who directed the men to get up on the beams?

A. That is Spirz's function.

Mr. Kay: I move to strike that answer on the ground it obviously is not responsive. I object to the question on the ground no proper foundation is laid. Rather, I will withdraw that. I ask that that answer be stricken because it wasn't responsive.

The Court: The answer may go out. [364]

Mr. Harrison: I asked if he knew who told the men to get up on the beams to perform their function.

The Court: Well, you got an answer.

A. Mr. Spirz.

The Court: Give him the answer. Read the answer, Mr. Reporter.

(Answer read by the Reporter.)

The Court: That is your answer to the question. It may be stricken. Develop the facts, whatever they may be.

(Testimony of Max Rosenstock.)

Q. (By Mr. Harrison): I will ask you again, do you know who told them—without telling me who they are—do you know? A. Yes, sir.

Q. Yes, you do? Who was it?

A. Mr. Spirz.

Q. Thank you. Was there at the time of the accident, Mr. Rosenstock, any planking over this skeleton or mechano deck? A. No, sir.

Q. Did anyone from the Jones Stevedoring Company ask you for any material to build such—for any such planking at all? A. No, sir.

Q. They did not? A. No, sir.

Q. I ask you from your observation of this operation, Mr. [365] Rosenstock, that if there had been some planking provided, would it have been possible for the men to stand clear of the airplane to steady it as it came down prior to the time that it was necessary for someone to go underneath and attach the bolts that hold the landing gear to the platform?

Mr. Kay: Just a moment. Your Honor, I object to that on the ground no proper foundation has been laid as to this witness. And the question obviously doesn't contain enough elements to give an intelligible answer.

The Court: I suggest you lay a foundation.

Mr. Harrison: I submit, your Honor, the man was there and saw the operation. I have asked him from his observation could he determine this.

The Court: Lay the foundation, if you can. Read the question, Mr. Reporter.

(Testimony of Max Rosenstock.)

(Question read by the Reporter.)

The Court: My suggestion was it is possible for you to lay a better foundation in order to have him give his opinion on that question.

Mr. Harrison: Well, I submit, your Honor, that any eye witness of this operation could determine whether or not it would have been possible.

The Court: I don't think so. I could be in error. However—how long have you been engaged in this activity? Did you load any of these ships before with these planes on? [366]

A. Hundreds of them.

Q. Hundreds of them? A. Yes.

The Court: Under conditions of this kind?

A. Same deal.

The Court: That is what I had in mind.

Mr. Harrison: I see, your Honor. I am sorry, I had overlooked the fact that we had to qualify him in that regard.

The Court: I just offered the suggestion to you.

Mr. Harrison: I was so familiar with the fact that he was doing this operation ever since the war.

The Court: Keep in mind the record. It won't be in the record unless it is developed.

Q. (By Mr. Harrison): With that foundation which the Court has so kindly laid, can you tell me—and perhaps I will rephrase the question—if planking had been put over this skeleton deck so that the men would have had another place to stand other than on the beams, would it have been pos-

(Testimony of Max Rosenstock.)

sible for the men to stand clear, that is, out from underneath this airplane to steady it as it came down, prior to the time that it was necessary for someone to go under there and fasten the landing gear to the platform?

Mr. Kay: I object to that on the ground that it is incompetent, irrelevant and immaterial; no proper foundation [367] laid, and calls for the conclusion and opinion of the witness.

The Court: In what respect has the foundation not been laid?

Mr. Kay: In this respect: He said he has seen hundreds of them. We don't know if they are the same as in this particular proceeding.

The Court: I asked——

Mr. Kay: They are different types of planes and different circumstances in each case. In this particular case there is no showing whether he actually saw, how much of it he saw, and so far as we know he saw very little. He says he didn't see exactly what happened. As to the planking, there is no—in the question alone, it does not indicate planking on the platform, how much, things of that nature. This would be highly speculative—a highly speculative answer.

Mr. Harrison: I submit, your Honor, this matter could go along much more smoothly if Mr. Kay would tolerate, perhaps, some of my inexperience in these matters. He is taking a very strict advantage of a highly technical position.

Mr. Kay: No, I don't intend to do anything of

(Testimony of Max Rosenstock.)

the sort. I think Mr. Harrison has done an admirable job to date on very little. I think he can take good care of himself. [368]

Mr. Harrison: I am not asking for your pity. I am asking for your consideration of all of us, Mr. Kay. We would like to get this case under way. I am quite sure you can make some spurious objections to every question I ask.

Mr. Kay: That is not it. I am not being facetious about this. In your question there is no description where they would put them, how many, what a man would have to do at a particular time, where the planking would be, with reference to the mechano deck at what juncture of this operation, all those things would have to go in.

The Court: I am sure you can develop that on cross-examination.

Mr. Kay: I most certainly shall, your Honor.

Mr. Harrison: I feel if the witness is as confused as Mr. Kay seems to be, he could qualify his answer accordingly.

The Court: Proceed.

Q. (By Mr. Harrison): Could you answer that question? You have probably forgotten it now, haven't you, Max?

A. I haven't forgotten it, but I couldn't remember the position this particular man was in.

Q. No, but answer the question, from your observation whether or not—we will shorten it—could a man have steadied this airplane without standing directly underneath?

(Testimony of Max Rosenstock.)

Mr. Kay: Your Honor, please, I have to make the same [369] objection. Here is a witness who testified he couldn't see where this man was, what position.

Mr. Harrison: I am not asking that man.

Mr. Kay: Then it is incompetent, irrelevant and immaterial.

The Court: Read the question, Mr. Reporter.

(Question read by the Reporter.)

The Court: It goes to the weight of the testimony and I will allow it. The objection will be overruled.

Q. (By Mr. Harrison): You may answer the question. A. It can be done.

Q. It can be done? A. Yes.

Mr. Kay: Pardon me, your Honor. So that we will have this again, may I have that last question and the answer re-read, please?

The Court: Certainly. Read the question, Mr. Reporter.

(Question and answer read by the Reporter.)

Q. (By Mr. Harrison): Max, during this particular operation to which we have referred on July 28th, 1950, did you at any time comment to anyone from the stevedoring company regarding the methods that were used in loading these planes?

A. No, sir.

Q. To your knowledge, Max, were there planks or scaffolding of sufficient length, that is, over ten

(Testimony of Max Rosenstock.)

feet long, available [370] to the stevedores should they have asked for them? A. Yes, sir.

Q. Did they ask you for them? A. No, sir.

Q. Do you know if they asked for them?

A. No, sir.

Mr. Harrison: Thank you, that is all. [371]

Q. Do you know if they asked anyone for them?

A. Not that I know of.

Mr. Harrison: Thank you, I think that is all.

Cross-Examination

By Mr. Resner:

Q. Mr. Rosenstock—— A. Yes, sir.

Q. You have worked with the Army for some nine years in this same general type of work?

A. Right, sir.

Q. The planes that were being loaded on the Shawnee Trail on the day in question were of what type of plane? A. F-80.

Q. Is that a jet plane?

A. That is a jet plane.

Q. There is testimony here that they loaded them in sections, the parts?

A. That is right, the aft fuselage is off.

Q. The F fuselage, what is that?

A. Aft end, the aft end of the plane.

Q. Well, how is that loaded?

A. That was loaded on the other side which—that is only about 20 feet.

Q. The part you were loading on the side where this accident happened was what?

(Testimony of Max Rosenstock.)

A. The forward fuselage, the main [372] fuselage.

Q. With the wings?

A. Landing gear and wings.

Q. Landing gear and wings? A. Right.

Q. What is the wing spread?

A. About 38 ten.

Q. Thirty-eight ten. What is the width of the fuselage? A. That is the spread.

Q. The spread, but the uselage itself, you say the spread is thirty-eight ten?

A. That is right.

Q. But part of that is fuselage? A. Yes.

Q. What is the width of the fuselage?

A. I couldn't say exactly, it would be about nine feet, I believe.

Q. Does it come down and is rounded underneath the wing? A. Right.

Q. How far does the bottommost part of the fuselage extend beneath the bottom part of the wing? A. You mean the floor?

Q. Yes. A. Be about two and a half feet.

Q. From the juncture of the curvature, that is, if that is the wing spread (indicating), and that is the bottom of [373] the fuselage, is that a very rough illustration?

A. You mean that is the nose?

Q. No, that is the bottom part.

A. See, on the after end that runs level, there is no break there.

Q. No break here (indicating)?

(Testimony of Max Rosenstock.)

A. No, that is where the aft end comes off.

Q. That is level? A. That is right.

Q. Completely?

A. About, maybe a couple inches sticking out, but not much.

Q. Like that (indicating)?

A. That is right.

Q. From the point where the top part of the fuselage joins the wing there are struts on the underside of the wing, are there?

A. Of course, that is a tricycle landing under the nose and two under the wings.

Q. How many feet over is the landing gear from the point where the fuselage joins the wing tips?

A. From the landing gear to the nose, landing gear—the landing gear?

Q. No. A. I don't get—

Q. This rounded section (indicating)? [374]

A. Represents the nose, that is the nose.

Q. We are looking at—this is a cross-section?

A. Yes.

Q. And we are looking forward, the nose would be up here, this is the after part which has been—

A. But that is not the aft part, the way you show it.

Q. Maybe it isn't clear to you. The part that you land on this particular type, if that is the nose, and then you have the wings coming out on both sides and the after part is off. A. No aft part.

(Testimony of Max Rosenstock.)

Q. That is right, you were landing, but you were just landing the nose and wings?

A. That is right.

Q. All right. Now, I am assuming that the nose is up forward? A. That's right.

Q. That's the nose, this part in here?

A. Yes.

Q. This part here then represents the aft part of the section you were loading, the rear part of it?

A. The rear part goes separate, you know, we put that way on——

Q. I am afraid, Mr. Rosenstock, I am not making myself very clear to you. [375]

A. I can show you an illustration, I have a model——

Q. Well, we have a picture here. Here is a photograph. A. I will show you exactly.

Q. You mind, Mr. Rosenstock? A. Yes.

Q. Well, we will get to yours in a moment. This is a—— A. This is the nose.

Q. Yes, exactly; there is the nose.

A. That is right.

Q. And this is the after end?

A. That is right.

Q. The end aft? A. Right, sir.

Q. That circular part I have drawn closest to us is supposed to represent that aft part?

A. That is right.

Q. Is that clear to you? A. That is right.

Q. And the part that is closest to us is the same thing. The question I am trying to get to you, you

(Testimony of Max Rosenstock.)

see here the curved portion of the fuselage comes to meet the wing? A. Yes.

Q. All right. From this point how far out toward the wing tip is the landing gear, how many feet out?

A. It would be about 15 feet. [376]

Q. Fifteen feet?

A. Fifteen feet, something, you know.

Q. Fifteen feet from where?

A. From the nose to the tip, from the belly to the tip; from here to there (indicating).

Q. Well, here we are——

Mr. Harrison: Just a minute, Mr. Resner, what have we got?

The Witness: Got a model.

Q. (By Mr. Resner): This is the part you were loading?

A. That is the part we were loading.

Q. What I am getting at, where do the wheels come in?

A. In here, one here, and one on the nose.

Q. Exactly, that is what I am trying to get at.

A. Correct.

Q. Exactly what I wanted to know.

A. That is the aft end, it is put together, the motor goes in there, and that makes it up——

Q. This is the nose, these wings, and this is the tail?

A. The motor goes in here and part of the tail.

Q. The motor is in that?

A. Yes, it is a jet motor.

(Testimony of Max Rosenstock.)

Q. All right. This is where the wing comes in, I mean, the landing gear? A. One here. [377]

Q. One here (indicating)?

A. That is right.

Q. One here (indicating)?

A. That's right.

Q. And one here (indicating)?

A. That's right.

Q. All right. Now, the question that I am asking you, Mr. Rosenstock is this: These wheels under the wings—— A. Yes.

Q. ——are how many feet from the juncture of the nose or the fuselage to the commencement of the wing?

A. You mean from the leading edge to here?

Q. Yes.

A. Be about three and a half or four feet.

Q. Three and a half or four feet, that is what I wanted to know. So it would be possible for a man to, in loading one of these planes, reach with one hand to the strut on the landing gear, put one hand up here on the landing gear, and then you put your other hand up here on the fuselage underneath the fuselage. You follow me?

A. The man doesn't hold onto the fuselage exactly.

Q. Nothing to hold on to, is there?

A. You see, three men working, you know, one will stay on the aft end, hold on to the nose.

The Court: You say three and a half from both those [378] points?

(Testimony of Max Rosenstock.)

The Witness: That is right, sir.

Mr. Resner: That is right.

Q. Now, my point is this: A man can reach out and he will have his hand on the strut like this on the landing gear——

A. Under the plane.

Q. Under the plane, and holding on to that?

A. Yes.

Q. Steadying it? A. Right.

Q. And another hand here and also holding on to the plane at least has a hand against the plane.

You understand me? A. No.

Q. You don't? Well, you explain it to me, Mr. Rosenstock.

A. One man stays here, on one landing gear, on the tripod.

Q. Yes.

A. Another man on this side. He can't—this man on the right side can't reach on the left side.

Q. Of course not.

A. And one man stays on the nose to steady it.

Q. Yes. All right. What I am getting at, when you are bringing this plane down, steadying it down, it is necessary to grab hold of the plane, isn't it? A. That is right.

Q. Of course, when you grabbed hold what is there on the [379] plane to grab hold of?

A. Hold of the wings.

Q. What else? A. That is all.

Q. And the tripod?

Mr. Harrison: I suggest, your Honor, the witness has answered.

(Testimony of Max Rosenstock.)

The Witness: Then on the tripod after, when the plane comes low enough.

Q. (By Mr. Resner): Isn't there a strut or something that you can hold onto there?

A. No, sir.

Mr. Harrison: I suggest, Mr. Resner is trying to change the witness' testimony, he testified that they grabbed on to the wing.

The Witness: That is what they do, the only way you can control the plane.

Mr. Resner: Wait a minute, now.

The Court: Just a moment. Everybody is acting in good faith, everybody will get an opportunity.

Q. (By Mr. Resner): Mr. Rosenstock, when do you put on the tripods?

A. When the plane is steady on the hook and stayed.

Q. How high is the plane above the mechano deck?

A. Two and a half, three feet, so the man can get to it. [380]

Q. Now, what does he fasten those tripods to?

A. The tripod goes in, right into the landing gear. There is a collar and a bitt.

Q. (By Mr. Resner): How large is the collar?

Mr. Harrison: Mr. Resner——

A. The collar would be two and a half, three inches.

Mr. Harrison: I object to this line of questioning, your Honor, on the ground that there is no testimony in this case that Mr. Luehr was attempt-

(Testimony of Max Rosenstock.)

ing to put the tripod on or doing anything similar. He says he was steadying the airplane, he said he had no bolts, had no platforms, and I assume from that he had no tripod, although I didn't ask him. I object to the question as entirely outside the scope of proper cross-examination.

Will you read the last question?

(Record read by the Reporter.)

Mr. Harrison: That isn't the question I objected to, I tried my best to object, but Mr. Resner persisted.

Mr. Resner: Mr. Harrison, I am not psychic, and I can't anticipate.

Mr. Harrison: You can hear.

Mr. Resner: I can't hear an objection until it is offered, sir.

The Court: Would you go back and read the last two or three questions? [381]

(Record read by the Reporter.)

The Court: Overruled. Let the record stand.

Mr. Kay: Mr. Reporter, may I have the page number?

The Reporter: 507.

Q. (By Mr. Resner): Now, this collar that is a part of the landing gear is an object, of course, that can be held onto with one's hand?

A. You can hold on a million places. What we do is hold onto the planes in order to steady the plane.

(Testimony of Max Rosenstock.)

Q. Now, this object that we are talking about is something you can grab ahold of with your hand?

A. Sure, you can grab anything.

Q. Anything you can hold onto, of course.

A. There is plenty of places to hold on to the wing.

Q. Hold on to the wings?

A. That is right, steady the plane.

Q. Steady the plane? A. That is right.

Q. And carried down to the place above——

A. Then we put on the tripod.

Q. And then you guide it down on the blocks?

A. Platform.

Q. On these three-corner platforms. There was nothing different in the way that this operation had been performed at the time that Mr. Luehr was hurt than any of the other [382] 12 or 13 planes that you had loaded? A. The same function.

Q. Except this plane fell on the man?

A. Just dropped a couple of feet.

Q. Crushed the man between the plane and the mechano deck?

A. I didn't see him get crushed, just didn't see, I was excited, a lot of hollering, trying to see how much damage there was to the plane——

Q. You were more concerned with the plane than you were with——

A. When he fell that is exactly what happened.

Q. I didn't hear you.

A. I—I was watching what happened to the plane, I heard somebody scream.

(Testimony of Max Rosenstock.)

Q. You were more interested in the plane?

A. I wasn't interested in the plane, but I was watching the plane.

Mr. Harrison: I object—

The Witness: To see how much damage to the plane, and found out afterwards the man was hurt.

Cross-Examination

By Mr. Kay:

Q. Mr. Rosenstock, you were in the fur business before you were assigned to work on these loading operations, is that right?

A. That's right, sir. [383]

Q. What experience did you have in connection with loading to qualify you to be an expert for the Army?

A. I worked for two years on ships first, you know, with another man.

Q. This was before you went with the Army?

A. No, sir, with the Army, not on planes, on all general cargo and working and helping the men on the planes at the beginning.

Q. They brought you in to teach you to do loading, but you have worked on general cargo, is that right?

A. Well, usually on some of the ships you load general cargo, and on deck load, we load planes, work on boats.

Q. Let us go back when you were first assigned to this work, you were in the business first where?

A. Right here in San Francisco.

(Testimony of Max Rosenstock.)

Q. How did you happen to get in this business with the Army?

A. I applied for a job, I was out of business then, got a job with the Air Force.

Q. When was that? A. '43.

Q. Now, before '43, you had not the slightest idea of loading operations on a ship, whether it was a plane or general cargo, is that right?

A. I didn't get it right, what was it?

Mr. Kay: Will you read the question? [384]

(Question read by the Reporter.)

A. That is right.

Q. And when you applied to the Army they sort of gave you a training period, is that right?

A. That's right.

Q. Well, what is the first thing you did in that training?

A. Used to check cargo aboard ship when they load Air Force cargo, especially planes, gliders.

Q. Did you do that yourself or——

A. No, there was another gentleman.

Q. And you went around with him and you saw how he checked the cargo, is that right?

A. How we load cargo, that is right.

Q. What month in '43 was that?

A. Must have been around, March or April.

Q. And when you went around with this man to see how you load cargo what did you do, how did you do that? Just watch him?

A. Just watch him.

(Testimony of Max Rosenstock.)

Q. Did you ever yourself do any loading?

A. Not at the very beginning.

Q. Well, how long was it before you actually did any loading yourself?

A. About eight or nine months.

Q. And what kind of work was that?

A. Well, actually I don't do any loading right now, just [385] make up the plans and instruct people to be loaded.

Q. Instruct them how to do it, but you, yourself, never had actual experience like a stevedore, is that right?

A. Nine years is a long experience.

Q. How is that?

A. I worked for nine years.

Q. Not that long in '43. A. '43.

Q. All right, you say it was nine months before you did any loading? A. That is right.

Q. Did you actually do any loading yourself like the stevedores do? A. No.

Q. And when was it that you ever had anything to do with the plane?

A. With the planes for the last seven years.

Q. Well, how long after you went with the Army in March or April of 1943 did you first have anything to do with loading planes?

A. Just watching the load.

Q. I am afraid you missed——

The Court: Just watching the loading.

The Witness: Just watched the gentleman load.

Q. (By Mr. Kay): Well, all right. How long

(Testimony of Max Rosenstock.)

was it before [386] you started watching them load airplanes?

A. What do you mean, how long?

Q. Well, you went to work for the Army in March of 1943. How long after that was it that you first even watched the plane being loaded?

A. Right straight ahead from the very beginning.

Q. From the very beginning when was the first time you saw any loading on a mechano deck?

Mr. Harrison: Your Honor please, I object to questions along this line. This man is not introduced as an expert, he is introduced as an eye witness, not as an expert. If Mr. Kay is attempting to disqualify him as an expert, I say he is wasting his time. I object to this line of questioning.

Mr. Kay: When I made that objection before it was obviously for that reason that this man was not qualified as an expert, that no proper foundation was laid. Your Honor gave Mr. Harrison the benefit of the doubt and allowed him to testify that if there were planking and so on, or could the men work with planking.

The Court: I have given you equal opportunity. Proceed. Objection overruled.

Mr. Kay: Will you read the question?

(Question read.)

The Court: Do you understand that question?

The Witness: Yes, sir. It was in 1944. [387]

Q. (By Mr. Kay): '44; what part of '44?

(Testimony of Max Rosenstock.)

A. At the beginning of '44.

Q. And now, I will ask you this: Up to the present day have you yourself ever participated in actually handling the planes in loading them, in putting them on the mechano decks?

A. No, my job is to make up the plan, tell them exactly where the planes go, where it will fit. I worked that out according to the scale and aid of scale, tell them exactly where the plane is going to fit and where it should be.

Q. All right. You don't presume to know, Mr. Rosenstock, just how these stevedores do their work, you are not a stevedore, are you?

A. Not a stevedore. I know how they should be loaded; exactly how they should be loaded.

Q. You feel you know how to handle the loading of a plane better than a stevedore who has been loading for years?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. You base that on what experience?

A. On the eight or nine years experience.

Q. Your experience in watching the loading qualifies you to know how to load planes better than stevedores, is that what you say?

A. That is right, I take up the planes myself without the [388] stevedores off the barges.

Q. Very well.

The Court: You are making a comparison there with the stevedores; you have to make some distinction in relation to the stevedores themselves.

Mr. Kay: That is correct, your Honor.

(Testimony of Max Rosenstock.)

The Court: Good, bad and indifferent. Keep that in mind. Goes to the weight of the testimony.

All right, proceed.

Q. (By Mr. Kay): I think we all know that. Now, Mr. Rosenstock, you said that it might be possible that a man could have stood, could have steadied the plane without standing underneath it. Now, you're talking about a plane coming over from the barge and it is up in the air and they have tag lines on it? A. Right.

Q. Right. And in that case these tag lines are alongside, some of the men can stand out apart from each other and away from under the plane?

A. Correct.

Q. And that is why they are providing these tag lines so that they can steady this plane while it is coming up overhead? A. That is right.

Q. Now, that operation is followed until that plane is put down to the position just before they are ready to land it on [389] the platform; right?

A. That is right.

Q. And when they get to that point the tag lines are no longer of any use, is that correct?

A. That is right.

Q. And from that point on the men have to steady that plane by holding on to some part of the plane, is that correct? A. That is right.

Q. And the best place to do that is where you can get a solid hold on the plane, is that correct?

A. Correct.

Q. And the strut is about the best place?

(Testimony of Max Rosenstock.)

A. The strut, you can't balance as on the wing tips, nose, the only way you can steady a plane.

Q. What is there on the wing tip or on the fuselage on which the man can get ahold better than the strut? Will you show the Judge on this picture? A. Yes, sir.

Q. All right.

A. Right under the nose, here. Right on the tip here (indicating).

Q. Yes.

A. Here, under the leading edge, trailing edge, wouldn't make much difference, and over here (indicating). The nose controls the plane. [390]

Q. Will you show the Judge where on the wing tip or at the nose there is anything the man can hold onto other than the wing tips or the nose itself?

A. Anybody take that little model so I can show it exactly——

Q. No, let us look at the picture, this is the plane we are talking about.

A. Okay. Here is the plane here. The plane is on the hook raised a little to have our control here, and the same thing here (indicating)——

Q. Now—— A. ——balance the plane.

Q. Now, how does—you can push it, by pushing against an edge like that, that is understandable, is that right? How do you pull it?

A. When the plane is steady, you don't pull it, just three feet high.

Q. You say you only steady it by pushing it?

(Testimony of Max Rosenstock.)

A. No, by holding on.

Q. What do you hold on to?

A. Here (indicating).

Q. Where is the wing?

A. Here is the wings.

Q. Are there any handles or anything of that sort that a man can get a firm grasp on on the wingtip? A. They don't need handles. [391]

Q. There are none? A. No, there isn't.

Q. Is there anything like that on the fuselage?

A. On the nose.

Q. What is there on the nose you can get a firm hold on with your hand?

A. There is a little pad, we call it a jack pad.

Q. The fuselage in this case is how many feet forward of the tripod that was to be landed on the platform? A. From the nose to the tripod?

Q. Yes. A. Six feet.

Q. Six feet? You say that it is only six feet from this tripod out to the nose of this plane?

A. Talking about from the leading edge to the nose?

Q. I am talking about the tripod.

A. Tripod to the nose, be about 12, 13 feet.

Q. Now, if you stood at the nose of this plane and you were trying to steady this plane as it was being guided into position on that platform, you wouldn't have a very good view of the platform and where this tripod was to be landed, would you?

A. You would.

(Testimony of Max Rosenstock.)

Q. Wouldn't you have a better view back there than you would right at the tripod? [392]

A. No, you can see from the tripod, too.

Q. You can see what?

A. You can see—have a good view.

Q. All right. You know that as the Government representative the Navy man, the Army man, whose business was to see that these planes weren't damaged when they were landed, is that right?

A. Also landed on the right spot.

Q. Exactly. A. Make up the plane.

Q. Exactly, that had to be done precisely?

A. That is correct.

Q. And in order to get that landed down there precisely on that platform when that plane was put in the approximate position where it was held still, the men tried to steady and guide it down and keep it steady so that it would get down on that platform, is that right? A. That is right.

Q. And the best way to do that is to get the nearest to that platform, isn't that correct?

A. After it is lowered? That is right.

Q. Yes. Now, Mr. Rosenstock, I guess you have seen how many ships, mechano decks, that is, that have been loaded with airplanes in your career with the Army; how many would you say? [393]

A. I can't say.

Q. Thousands?

A. I wouldn't say thousands.

Q. Hundreds?

A. About one hundred on mechano decks.

(Testimony of Max Rosenstock.)

Q. You have seen one hundred ships with mechano decks loaded with planes, is that right?

A. That is right.

Q. Some of this time that work was done by stevedores working directly for the Army; right?

A. Doing the work, that is right.

Q. And then later the men worked for stevedoring companies such as Jones and West Coast Terminals, is that right?

A. That is right.

Q. What other companies?

A. With the exception—locally I have seen, those are the only outfits.

Q. Those two. Did you—by the way, did you do any of this work other than at, in this Bay Area?

A. Yes, sir.

Q. Where else?

A. Liverpool, England; Mobile, Alabama.

Q. What did you do there?

A. They send me special to load some planes to Liverpool.

Q. Mechano decks? [394]

A. No, that was a different type of ship.

Q. But the mechano decks—

A. At Mobile, Alabama, was a mechano deck.

Q. How is that? A. Mobile, Alabama.

Q. Yes.

Mr. Harrison: Mr. Kay has taken upon himself to qualify this man as an expert on cross-examination. He wasn't introduced here as an expert, introduced as an eye witness.

Mr. Kay: Your Honor, this man has testified

(Testimony of Max Rosenstock.)

that he presumes to know that a plane could be landed without planks. We will find out how much he knows about it. Let us explore that. I can't see that Mr. Harrison has any complaint, came out on his direct examination; it is perfectly proper cross-examination.

Mr. Harrison: Asked him merely from the observation in this particular instance.

Mr. Kay: That calls for a conclusion, and the only way——

The Court: The objection will be overruled, counsel.

Q. (By Mr. Kay): Now, then, Mr. Rosenstock, in all those loading operations, that you observed, whether the Army did the work directly through employing stevedores, or through having a contracting stevedore, will you name one single instance where planes were loaded on mechano decks in which planking was used on top of the mechano deck? [395]

A. I believe once or twice that I know of.

Q. Out of how many times?

A. Out of quite a few times.

Q. Yes, out of hundreds of times; right?

A. Twice, I have seen that.

Q. What is the first time that you saw that?

A. Once at Anchorage 13?

The Court: Where is that?

The Witness: That is on the Bay.

Q. (By Mr. Kay): Who undertook to do that particular job?

(Testimony of Max Rosenstock.)

A. I mean the people used some timber, I don't remember the stevedoring company, who done that.

Q. They used some timber?

A. They used 2 by 12's, you know.

Q. 2 by 12's? A. That is right.

Q. Well, how many 2 by 12's did they use?

A. I think quite a few, I couldn't say exactly how many.

The Court: Do you know that of your own knowledge?

The Witness: That is right, sir.

Q. (By Mr. Kay): You say that, did you?

A. That is right, sir.

Q. What kind of planes were loaded on that occasion?

A. I'd have to look up, I couldn't remember the exact type.

Q. You don't remember the stevedoring [396] company? A. No, sir.

Q. It might have been either Jones or West Coast? A. Could have been anybody.

Q. You said those were the only two?

A. That is right.

Q. It would then have to be either Jones——

A. No, it couldn't have been West Coast, the Jones load outside piers, could be Jones.

Q. Could be Jones?

A. It could be Jones; it could have been Civil Service men. I don't remember exactly who it was.

The Court: Take a recess.

(Short recess.) [397]

(Testimony of Max Rosenstock.)

Q. (By Mr. Kay): You were showing some pictures there, Mr. Rosenstock. May I see them, please?

Mr. Harrison: Just a second, counsel, please. I would like to look at them.

Mr. Kay: We will both look at them, then.

Mr. Harrison: Not necessarily. They are not in evidence. They haven't been introduced.

(Photographs referred to were handed by the witness to Mr. Harrison, and by Mr. Harrison to Mr. Kay.)

Q. (By Mr. Kay): These pictures you have in your possession are pictures of planes of various types being loaded on a mechano deck, is that right, Mr. Rosenstock? A. Right, sir.

Q. And in all these you have got similar moveable athwartship—that is, fore and aft beams that you have on that model over there, isn't that right?

A. Right.

Q. And similar athwartship permanent beams that you have on that model?

A. They are not permanent. Each beam is moveable.

Q. I am talking about the others, athwartship?

A. Oh, on this model?

Q. Yes.

Mr. Harrison: These beams are moveable. That is the fore and aft beams. They are built so you can move them. [398]

A. Oh.

Q. (By Mr. Kay): So in these pictures, at least

(Testimony of Max Rosenstock.)

some of them, you have the same arrangement. You have got the moveable beams going one way and the permanent beams the other way?

A. That is right.

Q. And you show in these pictures a platform in which the tripod rests? Here is one right here (indicating).

A. There is one in the plane. This is a different type.

Q. But it has tripods and land on a platform like that model? A. That is right.

Q. And in this picture there is no planking other than the beams attached—that are normally on the mechano deck, isn't that right? A. Right.

Mr. Harrison: Just a second. Do the pictures show the plane after it is loaded or before?

Mr. Kay: Let's get that.

Q. (By Mr. Kay): When was that picture taken? A. It will be dated, sir.

Q. This is U. S. Army photograph 24 November, 1950, and the U. S. Navy ship machine San Gabriel. That is a tanker similar to the Shawnee Trail, isn't that right? A. That is right. [399]

Q. And this job was done about that time?

A. That is right.

Q. By whom? What stevedoring company did that? A. Jones Stevedoring Company.

Q. Jones Stevedoring Company? On this particular job was planking used when they put this plane on? A. No, sir.

Mr. Kay: We offer this in evidence, your Honor.

(Testimony of Max Rosenstock.)

The Court: Let it be admitted and marked next in order.

(Photograph was admitted into evidence as respondent-impleaded Jones' Exhibit B-1.)

The Witness: I am sorry, those don't belong to me.

Mr. Kay: You don't want me to have the rest of them?

The Witness: No, sir.

Mr. Harrison: You will have to give them to him if he wants them, Max. We will withdraw them.

The Witness: That isn't the same function as the other.

The Court: That isn't for you to determine.

The Witness: Oh.

Q. (By Mr. Kay): This time you referred to which you observed some timbers being used, you don't know the ship?

A. I don't remember the ship. It was at Pier 4, Oakland Army Base, the West Coast doing the loading. [400]

Q. West Coast Terminals?

A. That is right.

Q. You knew the West Coast Terminals did lots of loading, didn't you? A. That is right.

Q. And that is the only time you ever saw West Coast Terminals use planking? A. Yes.

Q. And that was just a couple of planks?

A. I don't remember how many planks, but that is the only time.

(Testimony of Max Rosenstock.)

Q. The only time?

A. That is the only time I have seen them.

Q. Yes. As a matter of fact, West Coast Terminals is doing all of the Army's—the loading on mechano decks for the Army right now, isn't it?

A. We aren't loading any.

Q. All right. When is the last time you did load any?

A. That would be about two years ago, I believe.

Q. Did West Coast Terminals do any of that?

A. Yes.

Q. And today the West Coast Terminals has a job for the Army, that is, in loading ships, is that right?

A. That is right.

Q. In fact, that is the only stevedoring company that has [401] a contract with the Army today, is that right, in the Bay Area?

A. Well, I couldn't say for sure; I don't know.

Q. All right. After the accident happened, Mr. Rosenstock, did you have any conversation with anybody from Jones Stevedoring Company with respect to changing the loading methods of airplanes on mechano decks?

A. No, sir.

Q. Did you make any suggestions of any nature to anyone with respect to changing the loading operations and the method of the stevedores with respect to planes on mechano decks?

A. No, sir.

Mr. Kay: I think that is all.

(Testimony of Max Rosenstock.)

Redirect Examination

By Mr. Harrison:

Q. I have one or two other questions. Max, with regard to steadying these airplanes counsel has tried to intimate it is necessary to have something to hold onto to steady those? A. It isn't.

Q. Isn't it true you can just put your hands on the wing when it is suspended and pull it towards you or push it away?

Mr. Resner: I object to that——

A. When the plane—— [402]

Mr. Resner: Mr. Rosenstock, I was making an objection, do you mind? If your Honor please, I should like to object to the question as being leading and suggestive. This is Mr. Harrison's witness.

Q. (By Mr. Harrison): How can the steadying be done when you don't have a straight grab?

A. You don't have to get a straight grab on a plane when the plane is on a hook, just a light touch will steady it.

Q. Thank you. Max, when this plane fell, was it spotted over the platform at that time?

A. No, sir.

Q. How do you know it wasn't?

A. Well, I was there, sir. The other platform on the eye beam, you will find come down just approximate to be on the tripods, and then the plane is landed to the tripod, and the platform is lined up to land the plane.

(Testimony of Max Rosenstock.)

Q. Did the landing gear of the plane strike the platform as it fell?

A. It must have. Of course the damage was slight. I couldn't say for sure.

Q. Did it strike the platform?

A. No, it didn't strike the platform.

Mr. Kay: I am going to object to the question and ask that the answer to the last question be stricken on the ground that he doesn't know. He says, "It must have." If [403] he doesn't know, that answer should go out, and he couldn't possibly answer the next question.

Mr. Harrison: He can explain it, I am sure.

The Court: Let the question and answer go out, and you develop the facts, whatever they may be.

Q. (By Mr. Harrison): Did the landing gear strike anything?

Mr. Kay: I object, again, because he said he didn't know.

Mr. Harrison: He said he didn't know whether it struck the platform.

A. The landing gear—can I answer?

Mr. Harrison: I think so.

The Court: You may answer.

A. Struck the eye beam, one of the landing gears.

Q. (By Mr. Harrison): Struck an eye beam?

A. That is right.

Q. Did the plane go all the way down to the wings? A. No, sir.

Q. The wings struck the mechano deck?

(Testimony of Max Rosenstock.)

A. The belly was resting on the eye beams.

Mr. Harrison: I believe that is all.

Mr. Kay: May I ask one other question?

Recross-Examination

By Mr. Kay:

Q. What was the name of the walking boss [404] on the West Coast job in which you say you remember on one occasion they did use planking?

A. Sir, I don't remember the gangs.

Q. Who was the walking boss of the West Coast Terminals at that time?

A. I don't remember. I remember Mr. Linden was there.

Q. Linden? A. That is right.

Q. What date was that?

A. It must be a couple of years ago. I couldn't say the exact date. It was loaded at Pier 4, Oakland Army Base, under Mr. Linden.

Q. At Oakland Army Base, and it was about two years ago? A. About two years ago.

Mr. Kay: All right.

Mr. Harrison: I have one other question.

Redirect Examination

By Mr. Harrison:

Q. Mr. Kay asked if you gave any instructions to the stevedores or made any suggestions as to how they performed these loading operations, and your answer was no. A. Yes.

(Testimony of Max Rosenstock.)

Q. Will you tell us why?

Mr. Kay: I object to that as calling for a conclusion and opinion of the witness. [405]

Mr. Harrison: He can tell us why he didn't do something.

Mr. Kay: No, that is a conclusion. He is apt to say anything to that.

Q. (By Mr. Harrison): Was it your job?

A. No, sir.

Mr. Kay: It is incompetent, irrelevant and immaterial.

Q. (By Mr. Harrison): I withdraw the question and ask you this: Was it your job to make any such suggestion?

A. No, sir.

Mr. Harrison: That is all.

Recross-Examination

By Mr. Resner:

Q. Mr. Rosenstock, I observe Mr. Harrison has been addressing you by your given name, and I assume you are on good personal terms?

A. No, sir. I met the gentleman twice.

Q. Twice? When was the first time?

A. Some months ago at the Oakland Army Base.

Q. Under what circumstances?

A. Around the building. I don't remember the circumstances. Somebody introduced me, says, "Meet Mr. Harrison," and I met him.

(Testimony of Max Rosenstock.)

Q. At that time did you discuss the situation involved in this case?

A. No. He asked me once about it, about the accident, if [406] the man was badly hurt.

Q. When was that?

A. About two or three months ago, or four months.

Q. He asked you two or three or four months ago whether the man was badly hurt?

A. Whether he recuperated or something. I couldn't remember exactly, you know.

Q. He asked you whether the man was badly hurt two or three months ago?

A. Five—I couldn't say the exact time.

Q. Was there anything else in this conversation besides the seriousness of the man's injuries?

A. No, sir.

Q. Nothing else? A. Nothing else.

Q. When was the other time you talked with Mr. Harrison?

A. Then I seen the gentleman maybe—I couldn't remember the dates.

Q. Well, give me your best recollection.

A. Maybe two months or six weeks ago I run into Mr. Harrison at the Army base.

Q. Was that in connection with preparing in the trial of this case?

A. No, sir, had nothing to do with the trial.

Q. Did you know what kind of testimony was expected of you [407] when you came here today?

A. No.

(Testimony of Max Rosenstock.)

Q. How did you happen to bring the photographs with you?

A. I happened to have a plane, I took the pictures after loading, and when I came I brought them. I spoke to one of your boys and he was telling me it was coming up.

Q. One of whose boys?

A. His name is Dick——

(Last name inaudible to the Reporter.)

The Reporter: What was that last name?

A. Worked for the Jones Stevedoring Company.

Q. (By Mr. Resner): You were talking to him when?

A. Last Monday, and he asked me, "How come, Max, you are not in Court?" I said, "Why?" He said, "Ted Spirz was called on that case," and that is the reason I had these pictures and I brought them with me in case something come up.

Q. What, Mr. Rosenstock, did you expect to do with them? A. Nothing.

Q. Then why bring them?

A. I figured if these gentlemen never seen a mechano deck, want to see how a platform is built, I figured I will take the pictures so I can show them to the lawyers.

Q. You brought them up to educate us, is that it?

A. No education. I figured some counsellors have never [408] seen a mechano deck.

(Testimony of Max Rosenstock.)

Q. So on your own initiative you just thought it would be a nice idea to bring up these pictures to show us lawyers what it looked like?

A. Why not? Surely.

Q. I haven't seen them. Maybe I can learn.

A. Take a look.

Q. By the way, you made a report on this accident to the Army?

Mr. Harrison: I didn't hear that.

A. We made a report on the amount of damage to the plane.

Q. (By Mr. Resner): And you made a report on the circumstances of the accident?

A. No, sir.

Q. How many reports did you make, Mr. Rosenstock?

A. Made about four or five copies. You make on every damage.

Q. How many separate ones did you make?

A. None.

Q. One report? A. That is right.

Q. When did you make it?

A. Right after the ship—right after the accident.

Q. What does the report contain?

A. Just what the damage amounted to, the damage to the plane. [409]

Q. Only that?

A. Only that. That is my function. I have nothing else to do.

Q. Nothing as to how the accident happened?

(Testimony of Max Rosenstock.)

A. No, sir.

Mr. Resner: I should like to ask your Honor to direct the Government to produce Mr. Rosenstock's report.

Mr. Harrison: I don't have it. I never have seen it, but I will look for it. Do you have a copy of it, Max?

A. I don't have. I can bring it up. About \$200 damage to the plane. We check on man hours, that is all we do.

The Court: You made a report to whom?

A. Just to our office.

The Court: Do you have a copy in the office?

A. I will check, sir.

Mr. Harrison: I don't know what other source I can go to, but I will do my best to have that report available.

Mr. Resner: All right.

Mr. Harrison: I believe that is all.

(Witness excused.)

Mr. Kay: Your Honor, please, we have a witness whom we have had here for a couple of days and had hoped to get him on by this time, and he tells me he has an important ship coming in in Seattle and would like to get away tonight, [410] so Mr. Harrison has agreed we may put him on out of order, and I presume you gentlemen will stipulate?

Mr. Harrison: Your Honor, please, I didn't realize at the time that I said it was all right that

the cross-examination of Mr. Rosenstock would take so long. I have two stevedores here under subpoena and I am sure the examination—my direct examination won't take more than two or three questions. If I may dispose of them first?

Mr. Kay: If we can do that, because I have——

The Court (Interposing): I will try to control the situation. There is no objection to him taking his witness?

Mr. Harrison: I object to him taking until four o'clock. I don't want to resubpoena these gentlemen.

The Court: We will direct them to come back, that will dispose of that.

Mr. Harrison: I think we can finish with them in five minutes.

The Court: If this witness has been here two days, maybe the longshoremen need to relax a bit and rest, so they may relax and we will call the witness counsel wishes.

Mr. Kay: Thank you, your Honor. Call Fred Nystrom.

FRED I. NYSTROM, JR.

called as a witness on behalf of the respondent-impleaded, Jones Stevedoring Company, [411] sworn.

The Clerk: State your full name to the Court?

A. Fred I. Nystrom, Jr.

The Court: Where do you live?

A. Seattle, Washington.

The Court: Your business and occupation?

A. Operating manager of a steamship company.

(Testimony of Fred I. Nystrom, Jr.)

The Court: What steamship company?

A. International Shipping Company.

The Court: How long have you been so engaged?

A. I have been in the steamship business actively for 29 years.

The Court: Briefly give me your experience during that period of time so I may have a general idea?

A. Well, I started in years ago, your Honor, on deck, spent some time on deck and in the engine room, clerical department; I have been a stevedore and trucked cargo around docks, worked in the holds, worked on gear; district superintendent for a steamship company in Alaska for four years, returned to the States in 1931; district superintendent of Puget Sound; assistant general superintendent of another company for several years; went into the service in late January of 1942; returned to the commercial steamship business in late 1945 as operating manager of the company that I was with prior to the war.

The Court: That is the occupation you are engaged in at [412] the present time?

A. Yes, sir.

The Court: All right.

Direct Examination

By Mr. Kay:

Q. When you went into the service, in what capacity did you serve?

A. I was asked by the Port Air Office, San

(Testimony of Fred I. Nystrom, Jr.)

Francisco Port of Embarkation, to come in as a civilian adviser.

Q. For what department of the service?

A. The operating department.

Q. Of the Army? A. No, the Air Force.

Q. Air Force? And you were employed, then, in a civilian capacity for how long?

A. Well, sir, I agreed to stay for two weeks, and that subsequently developed into two months; then the situation was so bad that I didn't have the heart to walk away and leave it.

I was at that time under commitment to go into the Navy. The Navy telephoned me the day after Pearl Harbor how long it would require to report. I told them at that time I could make it in about 15 minutes, and they told me they couldn't move that fast. And I later found my father was in a Japanese prison camp, so I asked permission of the Navy to go to see my mother, and passing through San Francisco [413] I made what I thought would be a social call to the San Francisco port of embarkation, and that fixed it. That is as far as I got.

Q. You finally found yourself as a commissioned officer in the Army Air Force, then, is that right?

A. As chief of operations, yes.

Q. What were your functions there?

A. At that time there was a Port Air Office at the San Francisco Port of Embarkation, at Fort Mason; subsequently changed to the Pacific Overseas Command, which of course is divided into the

(Testimony of Fred I. Nystrom, Jr.)

usual number of four divisions. I served as officer in charge of the operating division or operations division.

Q. And eventually your rank was increased to that of Lieutenant Colonel, is that right?

A. Right.

Q. Now, in connection with your service did you have to do with loading or supervising the loading of planes on mechano decks?

A. Supervision to the extent that the Air Force— may I explain that?

Mr. Harrison: Your Honor, may I interrupt and ask the Court to instruct the stevedores to return tomorrow morning so that they may leave now? Running like this, we will certainly last until four o'clock. [414]

The Court: Step forward, sir.

(Two prospective witnesses approached the bench.)

The Court: Will you be able to come back tomorrow?

A Prospective Witness: Yes, your Honor.

The Court: What about your associate?

A Prospective Witness: I don't know. My leg is bothering me too much, your Honor. I have neuritis.

The Court: We will make it very comfortable for you. All right, return tomorrow morning at ten o'clock.

Mr. Harrison: Thank you, your Honor.

(Testimony of Fred I. Nystrom, Jr.)

Q. (By Mr. Kay): Do you know where you were, Mr. Nystrom?

A. Well, yes, I think I can pick it up. Under our system of operations, your Honor, the Air Force, or this particular command that I was associated with, or served under, assumed the responsibility for all Air Corps materiel at the point of inception, or, shall I say, the place at which it was manufactured.

It was our responsibility to deliver it to the theatre in which it was required such being the case, this materiel, including airplanes, was brought into one of several Pacific Coast ports of embarkation. At that time it was tendered to the army transportation corps, and they in turn actually did the loading of it. I must not infer or cause anybody to believe that the Air Force superintended the actual loading because that was done by the transportation corps. [415]

Q. Did the Army Air Force have a representative aboard these vessels to at least inspect the planes being put aboard?

A. Each and every loading, yes, sir.

Q. And was that in connection with mechano decks?

A. Yes, sir.

Q. These mechano decks were on tankers, is that right?

A. Right.

Q. And that model you see over there, does that fairly represent the section of the deck, the mechano deck, of one of these vessels?

A. I would say so.

(Testimony of Fred I. Nystrom, Jr.)

Q. Now, what would you say is your estimate as to the total number of these ships that you observed in this loading operation, roughly?

A. Total number of loadings or mechano deck loadings?

Q. First, the number of vessels with mechano decks approximately?

A. I would say it was in excess of 150, possibly 200.

Q. And that would represent about how many planes actually loaded on mechano decks?

A. Three thousand.

Q. Now, Mr. Nystrom, I will ask you whether in any of those loading operations covering some three thousand planes, [416] whether you ever saw planking used by the stevedores, or whoever was loading the planes on board the mechano deck, upon the structure of the mechano deck?

A. Definitely not. [416-A]

Q. Let me ask you if in your experience of loading these planes the following description of a loading operation would be the usual and customary method of putting a plane aboard?

Mr. Harrison. Your Honor, please, this man didn't have anything to do with putting the plane aboard, himself, don't think he is qualified to testify to the usual and customary method.

Mr. Kay: Let me ask a couple more questions.

Q. Did you have charge of the entire Pacific Coast for the—on behalf of the Navy, or the Air

(Testimony of Fred I. Nystrom, Jr.)

Force in connection with the work that you have described?

A. Under the supervision of the commanding general, yes.

Q. Yes. And that took you from Seattle to San Francisco to Los Angeles, is that right?

A. Including Prince Rupert.

Q. Well, now did you have anything to do with designing any of the gear that was used to load planes on these mechano decks?

A. Considerable.

Q. What are some of the things that you designed?

A. Mustn't think that I designed, I assisted in designing.

Q. Participated in it?

A. In the tripods that, your Honor; at that time we were shipping largely P-38's, the landing gear is retracted, the tripod is affixed through a fulcrum gear, the all-steel tripod [417] on some of them rather than on its wheels.

Q. I will show you Libelant's Exhibit 14 and ask you if that is one of the things that you are talking about there, showing here this tripod that is resting on a platform on the mechano deck?

A. Yes, only I worked in connection with this, —this plane was developed after the war was over, I had no experience in handling this particular plane. However, this appears to be an adaptation of the tripod we developed here during the war.

(Testimony of Fred I. Nystrom, Jr.)

Q. Thank you. Now, in connection with landing a plane that has one of these tripods—

Mr. Harrison: I object to this line of questioning, he just said that he has never had anything to do with this particular type plane or tripod, not qualified to testify here.

Mr. Kay: Let me ask a couple more questions and maybe Mr. Harrison will be satisfied.

Q. This tripod that is shown on this plane resting on this platform here, will you state whether or not that is substantially the way these planes, these other types of planes you had were loaded on mechano decks? A. Right.

Q. As you see it in this picture here, the tripod on that platform, is that substantially the manner in which these [418] planes were rested and secured upon the mechano deck? A. Yes.

Q. Regardless of the type of plane they were. And when you—would there be any difference in the, any substantial difference in putting either that type of plane aboard or some other type where you had to use a barge with a crane alongside and bring the plane over on to the mechano deck and then land it down, that is land the tripods down on these platforms?

Mr. Harrison: I object to that, your Honor, on the ground that this witness has testified he doesn't know anything about the loading of this particular type of plane and can't compare it with the loading with any other type.

The Court: Are you familiar with this type at the present time?

(Testimony of Fred I. Nystrom, Jr.)

The Witness: Of the plane, sir?

The Court: Yes.

The Witness: No, I have not seen that particular plane.

The Court: That is the plane itself?

The Witness: Yes. In other words, that was manufactured after I left the service.

The Court. All right. What kind of planes are you familiar with?

The Witness: P-40's, P-47's, P-38's.

The Court: In relation to their weight and length and breadth, are they substantially the same as these? I mean, [419] from the standpoint of loading?

The Witness: Oh, yes, the problem is basically the same.

The Court: Proceed.

Q. (By Mr. Kay): Now, then, I will ask you, Mr. Nystrom, whether or not the following description of the landing of one of these planes is the customary and usual method that was used during your experience which, by the way, was over what period of years? A. 1942, 1943 and 1944.

Mr. Harrison: Your Honor, please, I would like to interpose an objection, perhaps I could ask one or two questions on voir dire?

The Court: You may.

Q. (By Mr. Harrison): Did they have this particular plane during the time you were familiar with the loading operations?

A. They weren't being shipped.

(Testimony of Fred I. Nystrom, Jr.)

Q. Were the P-38's shipped with the engines in or out? A. In.

Q. In other words, they were substantially heavier, were they not? A. P-38's?

Q. Yes. A. Yes.

Q. Were there any other planes shipped without engines that you had anything to do with? [420]

A. Oh, a few salvage jobs that were being returned from the theatres, from action, but not planes shipped from the States.

Q. The salvage jobs would not be shipped on mechano decks or tripods, just thrown in the best way possible? A. Every way, shape or form.

Q. Is it true that you have never had anything to do with loading an airplane which is nothing but the fuselage and the wings?

A. Yes, I believe that's right.

Mr. Harrison: With that answer, your Honor, I object to any further testimony of this witness on this line of questions.

The Court: Going to the weight of the testimony in landing these planes on the tripods.

Mr. Harrison: I submit, your Honor, that must be an entirely different problem.

Mr. Kay: No, no. This witness has testified it is substantially the same.

The Court: I am so limited, I wouldn't think, but it is pointed out to me—you have had some experience?

The Witness: Sir, the problem is much the same on all of them, basically.

(Testimony of Fred I. Nystrom, Jr.)

The Court: Without knowing, that would be my thought. I may be mistaken.

The Witness: Your Honor, may I say that you have in [421] substance two different problems. You have got, number one the tripod, I mean, the tricycle gear, which is the nose wheel and the two main landing wheels, alternately you have two main landing wheels with a tail wheel, the only difference is the third wheel, which is on the back on one and in the other is on the front. But as to the balance of the operation it is the same.

Q. (By Mr. Kay): Mr. Nystrom,—

The Court: Are you going to get back to Seattle? If you are you better liven it up.

Mr. Kay: Maybe he will need a plane—well, he is taking a plane, anyway. If I can keep Mr. Harrison down for about two more minutes—

Mr. Harrison: That is the most unjust remark from that particular individual I have ever heard. I object to it, you have been up and down like a jackrabbit.

The Court: Both of you are violating the rules. Proceed.

Mr. Resner: I want your Honor to notice that I have had nothing to say.

The Court: Let us get through, gentlemen, please.

Q. (By Mr. Kay): Mr. Nystrom, of course you have seen operations where they take, with a barge alongside the tanker, and using a heavy crane, lift them over the deck and set them down, right?

(Testimony of Fred I. Nystrom, Jr.)

A. That is the principal method, that they were loading in [422] San Francisco and Los Angeles areas during the war.

Q. All right. Once you take a plane over the deck and bring it down to position where it is about to be landed, where the—and I am speaking now, you have in mind this plane, although you didn't work on this particular type of plane, but you say the operation is substantially the same, and that plane is held still over the spot, the approximate spot where the tripod is to be landed on that platform, will you state whether or not it is the customary and usual practice of the stevedores to hold onto the strut as it is being guided into position down on its final resting place?

Mr. Harrison: I object, your Honor, please, on this ground: Mr. Kay in his hypothetical question has assumed something not in evidence here, the plane wasn't spotted over the platform at this time. The witness cannot testify as to something that is not in the record.

Mr. Kay: All right, your Honor, I have it here.

Mr. Harrison: I believe your Honor will recall Mr. Rosenstock just testified it was not.

Mr. Kay: That is your evidence; we have got evidence to the contrary.

Mr. Harrison: Your Honor will also recall the libelant testified that the wings came all the way to the mechano deck. I submit if the landing gear had hit the spot over the platform it would have

(Testimony of Fred I. Nystrom, Jr.)

hit the platform, the wings would not have [423] gone to the mechano deck.

Mr. Kay: May I read this testimony, and it is very short, your Honor. This is on page 237 of the transcript of March 19.

“Q. (By Mr. Kay): Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your left hand and ahold of the fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck, is that correct?”

“A. That is correct.”

Now, your Honor, I submit that is our evidence. Maybe your Honor won't believe it, but we are entitled to put on any evidence in this record, to submit that to the witness and ask him whether in his experience this was the customary and usual practice of the stevedores.

Mr. Harrison: Your Honor, please, may I finish, Mr. Kay, I have something to read from yesterday's record. May I read my recross-examination on that point? I asked Mr. Luehr:

“Q. Did you have the platform with you that was going to be underneath the wheel?”

“A. The platform already was underneath there.

“Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform? [424] A. No, sir.

(Testimony of Fred I. Nystrom, Jr.)

“Q. Were you going to fasten it?”

“A. No, sir.

“Q. You were there to steady it, is that right?”

“A. That is right.”

In other words, Mr. Luehr's testimony was that he wasn't there to put the landing gear on the platform.

Mr. Kay: That is qualified with this, your Honor: Naturally at that moment he couldn't put the bolt on the platform or—that is not inconsistent at all, that is in connection with this testimony of Mr. Luehr's that the next succeeding operation—this is all a part of it—at that particular time that he had ahold of the strut, obviously he couldn't be putting the bolts in, couldn't be doing those things in the steadying process, and that has been described by Mr. Spirz as well as Mr. Luehr, was that at this point that this plane was held still to bring it down to its final resting place and in doing that job, to steady the plane, these tag lines were no longer of any use, weren't used and the man had to hold onto something solid that he could guide it down, at the same time seeing the tripod, coming down on that platform. It is as clear as that, your Honor.

Mr. Harrison: I submit, your Honor, Mr. Luehr's testimony, Mr. Rosenstock's testimony, in the facts of the case whereby the plane came all the way down and struck, the wings [425] on the mechano deck, clearly demonstrate that they were not at the moment that Mr. Luehr was injured

(Testimony of Fred I. Nystrom, Jr.)

over the platform, nor were they at that moment ready to fasten the bolts or anything in regard to the platform. It is at that particular moment we are involved with. Mr. Kay is trying to get from this witness testimony regarding the next thing to be done. I submit that is entirely irrelevant.

Mr. Kay: No, that isn't it, your Honor. I said that is a part of the process.

The Court: The Court is prepared to rule, you can argue the case at the proper time; I will give you a record. Overruled.

You understand the question?

The Witness: No, sir, I don't recall it.

Q. (By Mr. Kay): Let me reframe it, then. After this plane is brought to a standstill over the deck, over the approximate area on which it is to be landed, that platform down there, you follow me on that, don't you? Is that the way it is done up to that point, get it up in the approximate area where you are going to land it on the platform, is that correct?

A. You are speaking now of this particular plane or of any plane?

Q. Well, let us take any plane in any operation.

A. Yes, that is correct.

Q. In other words, you can't take it with the crane and just [426] put it right down on that spot, can you? A. No.

Q. You get it to a certain position and somebody has got to be there to see it is going on down

(Testimony of Fred I. Nystrom, Jr.)

exactly as it can be on that exact spot, isn't that correct? A. That is right.

Q. And in the course of doing that, somebody has to be there, somebody has to hold on to that plane, isn't that correct? A. That is right.

Q. And you can't do that with tag lines? Is that correct? A. Correct.

Q. Is it the usual and customary practice so far as your experience goes that stevedores do hold onto the plane to get it down to that spot after it is held still and it is over the approximate place it is to be landed? A. Right.

Mr. Kay: That is all.

Cross-Examination

By Mr. Harrison:

Q. What is your name, sir?

A. Nystrom. I seemed to have acquired a San Francisco throat since coming down here.

Q. Mr. Nystrom, you have stated that you have never operated on one of these loading operations where the planes had the engines out, is that [427] true?

A. I meant to indicate that I have never loaded any planes from the States going out, I have handled planes that came back from the various theaters that had the engines out.

Q. But they were not—were they loaded on mechano decks with tripods?

A. Some of them, yes.

Q. Can you state whether or not—strike that.

(Testimony of Fred I. Nystrom, Jr.)

Can a plane with an engine in it that is suspended from a hook be steadied as easily as a plane, a light plane, just the wings and the fuselage and no engine?

A. Would you mind restating that, please?

Q. Certainly. Can a plane with an engine in it, let us take for instance, a P-38; they have two engines, do they not? A. Yes, sir.

Q. Yes. Let us say a plane with an engine or two engines in it, can it, when suspended on the cargo hook before the landing operation be steadied as easily as a plane where only the wings and the fuselage are being landed?

A. I would say it could.

Q. You don't think that the weight of the engine or anything would contribute to the difficulty in steadying the plane?

A. No, to the contrary. I think if the engine is in it, and the tail assembly is on, you have a set-up plane, you have a better balance, and with a better balance your ability to steady it, as you call it, and I am not too sure what you mean [428] by the word "steady," but your ability to control the movements of that plane would be better.

Q. Now, from your observation of all these thousands of loadings you have testified to, is it in your opinion necessary for a man to stand underneath that airplane before it reaches the platform upon which it is going to be rested?

A. You say reaches the platform. You mean by the time it is landed on the platform?

(Testimony of Fred I. Nystrom, Jr.)

Q. I mean by the time the landing gear itself is directly above the platform.

A. But not on the platform?

Q. Not on the platform.

A. If you are going to get that plane down where you want it, it seems to me you are going to have to, on certain types of airplanes, to get a man under there.

Q. Let me ask you this: Is it necessary for a man to get under there before the landing gear of the plane arrives at the spot over the platform?

Mr. Kay: Just a moment. I object to that as not within the direct examination, and incompetent, irrelevant and immaterial. There is no evidence in this case that this man was under this plane before it got over that platform.

Mr. Harrison: I submit, your Honor, that the man himself testified that it wasn't yet ready to be over the platform. Mr. Rosenstock testified that the landing gear wasn't over the [429] platform——

Mr. Kay: That isn't the question.

Mr. Harrison: I asked——

The Court: Aren't we concerned to the period of time when it stopped before it fell?

Mr. Harrison: Yes, your Honor, but I think the facts will reveal from Mr.—the crane operator's testimony, Mr. Bailey, that the movement which he was about to do at the time that the plane fell was to boom down. Now, it was also brought out in that testimony that booming down wasn't going to lower the plane, he was going to hold the plane

(Testimony of Fred I. Nystrom, Jr.)

up and boom down for the purpose of swinging it across the deck.

The Court: Well, not what he is going to do, but what happened and what was done is what we are concerned about, and our problem here, it seems to me, is from the period of time it stopped until it actually occurred.

Mr. Harrison: What I am getting at, your Honor, where was it stopped?

The Court: Well, the testimony shows about three feet.

Mr. Harrison: Three feet above the platforms, above the mechano deck, but where in relation to these platforms is what I am getting at.

The Court: Yes.

Mr. Harrison: My contention is that until the plane arrived at a spot over these platforms, there was no necessity [430] for the men to go beneath it.

The Court: Well, there is testimony, too, in relation to the weather, the wind, and the necessity of getting this—described here, not only of the plane, to guide it, but to guide it over wherever they were trying to land it on the platform.

Mr. Harrison: Of course, that testimony was from Mr. Spirz. Your Honor, there is contrary testimony.

The Court: That is the reason I am allowing this testimony in the fashion I have, can't limit it to one or two witnesses, have to use all.

Mr. Harrison: I think the facts themselves, your Honor, illustrate that the plane had not yet ar-

(Testimony of Fred I. Nystrom, Jr.)

rived at a point over these platforms. Had it been over the platforms when it fell, the landing gear would have struck the platform and not have gone all the way down.

The Court: I don't think that without knowing whoever is operating this thing to land it on the platform can make that kind of a job out of it without the guidance of whoever is responsible, responsibility it is to guide it on those points, the three— [431]

Mr. Harrison: That is true, but those platforms are of considerable width, and it is our contention that they had not arrived to the point where they had to guide the landing gear onto the tripods of the platform.

The Court: Our problem here, what you are trying to do is to determine whether or not it is necessary for him to go under it?

Mr. Harrison: At the particular time, yes, sir.

The Court: All right, ask the direct question.

Mr. Harrison: All right.

Q. Assuming that the plane has not arrived at a point where with direct fall the tripods, I mean the landing gear, would have to be fastened to the platform—in other words, assuming that the landing gear are, say, still two or three feet away from the platform, is it at that time necessary for a man to go underneath the platform?

A. That would depend upon the type.

Mr. Kay: I want to note my objection for the record, same objection previously made.

(Testimony of Fred I. Nystrom, Jr.)

The Court: Overruled.

The Witness: I would say, Mr. Harrison, that that is entirely contingent on the type of plane you are talking about.

Q. (By Mr. Harrison): You don't have any familiarity with this particular type of plane?

A. It could be it would be necessary on some type of planes [432] that we handled during the war the entire handling of the plane was underneath. Possibly I might enlarge, your Honor. That tripod that they use might be like my glasses, and it has one pin, that pin goes through a collar, such as Rosenstock was trying to depict, the heavier planes goes through a fulcrum gear, the construction of the thing, it isn't an equilateral triangle, sometimes that tripod will come down at this angle (demonstrating).

The Court: On one——

The Witness: On one side. Other times it will come down this way, or a lesser angle, have to get a firm landing, have to get that flat on the platform. If you don't, you are not only going to break the tripod, but damage the airplane.

The Court: And taking a step further, that is for the purpose of locking it in there?

The Witness: That is right.

Q. (By Mr. Harrison): Let us make it clear, however, that until the tripod arrives over the platform, none of that operation takes place, is that true?

A. Not entirely so, some types of planes they

(Testimony of Fred I. Nystrom, Jr.)

put the tripods on after they are positioned over the platforms.

Q. In some operations they put the tripods on first?

A. Some operations they are put on at Sacramento before they come down here.

Q. But to be—to make it clear, to the best of your [433] knowledge, it is not necessary for a man to go under there to do anything with the tripods until it arrives over that platform, is that right? A. Yes.

Mr. Harrison: Thank you.

Redirect Examination

By Mr. Kay:

Q. Mr. Nystrom, when you bring this plane over to the approximate area, you don't know within a matter, sometimes of maybe one or two feet, is that right, where it is finally going to rest; correct? A. Correct.

Q. And so the men that are doing this job, whether or not it is exactly over that, would still have to go out and get hold of that plane to help guide it down there, is that correct?

A. Correct.

Q. Why wouldn't you use planking on this type of a deck, a mechano deck?

Mr. Harrison: I object to this, your Honor, this man is not a stevedore, not a safety expert, not qualified to testify on that subject.

(Testimony of Fred I. Nystrom, Jr.)

The Court: Goes to the weight of the testimony. I will allow it. Overruled.

The Witness: Your Honor, I would say that the use of planking on this type of a deck would constitute a very [434] serious hazard, a serious hazard not only to life, but a serious hazard to the airplanes. In the first place, on that lower deck you have many obstructions. You have men, during the normal course of operations of a tanker, you have men walking up and down there, the mess-rooms, the quarters, some of them are amidship, more or less traffic in there. You get a span of ten or twelve feet, whatever it is, allowed for the handling of these planes. You would have to use about three-inch planking, and a three by twelve plank, twelve to fourteen feet long, is very heavy. The natural inclination, if you provide planks to work on, would be for some of the men to use them, some wouldn't. The result would be that the man walking around that deck would assume that he had a place to walk on, possibly walk backwards, and there wouldn't be any plank there.

Secondly, those beams, you have no stoppers on them, so therefore a plank over the top of it would be a free agent, you might say, could be firmly placed on this side or maybe it won't be. The man steps on the other end, down the plank goes, and down the man at the same time.

The danger of men, assuming that they had a plank to walk on, would preclude itself from any sensible operation, I take it.

(Testimony of Fred I. Nystrom, Jr.)

Recross-Examination

By Mr. Resner:

Q. I have one question. Are you intimating that it would be less safe with an area to walk on than merely [435] the six or eight inch beams?

A. I very definitely am.

Redirect Examination

By Mr. Kay:

Q. Would you explain why, Mr. Nystrom?

A. Furthermore, in getting those planks out from underneath the planes, they would have to be raised to begin with before they could be moved. You always have projections there between all the airplanes, sometimes the vertical clearance from the top of that deck and the lower part of the airplane is very, very little. You have men raising those planks and moving them. Heaven only knows what shape your airplane is going to be in when you are through with it.

Recross-Examination

By Mr. Resner:

Q. Also true, Mr. Nystrom, if you laid them on top of the movable beams you would have to take the planks off every time you wanted to move the beams in order to find a place to put the little wooden platforms? A. Yes.

Q. And if you laid them on the solid beams which run athwartship you would have to move

(Testimony of Fred I. Nystrom, Jr.)

the beams also in order to—if you had to move the movable beams or move the solid beams, so whichever way you would have to move them, you would have to move them every time you moved the beams? A. That is right.

Q. There would also be the danger of dropping the planks on [436] the men below as well as the danger of the men walking on the planks above?

A. That is right.

Mr. Harrison: Is this cross-examination?

Mr. Resner: Well, Mr. Harrison, the army, the government built that ship——

Mr. Harrison: Your Honor, I ask that Mr. Resner stop arguing this case.

The Court: The jury is absent.

Mr. Resner: Thank you, sir; I am through.

Recross-Examination

By Mr. Harrison:

Q. Mr. Nystrom, you don't seem to think much of putting planks over here. I might ask you what you would think of—I am talking about the safety of the men, Mr. Nystrom. I noticed that you said that the planes, there were objections because they might damage the plane. We are not concerned here with that, we are concerned here with the safety of the men.

Now, I might suggest to you, would it be possible to sling platforms with either iron hooks or lines so that the platform would, say, be four or five feet, two or three feet in width, a painter's

(Testimony of Fred I. Nystrom, Jr.)

platform, a sling, a painter's platform underneath the mechano deck—let me describe it with this pencil.

For instance, take lines from the end of the planks or [437] walking boards and just sling it down below here (indicating)—the pencil is not long enough, but I think you understand what I am talking about, make this a safe walkway down here. Would that not facilitate the operation and lessen the danger of men being struck by the plank?

A. No, to the contrary, I think it would be a greater hazard.

Q. You don't think that would lessen the danger of men being struck by an airplane? A. No.

Q. You explain that, please?

A. May I go to the model?

The Court: Certainly.

The Witness: This model, your Honor, is one side of one-half of the ships which we are talking about. This area in here, generally speaking on these ships you have a maze of projections. Most of these ships are equipped with what they called a Butterworth system. It is a steam cleaning device and there are many small hatches so that this equipment can be used so that the men can get down to these tanks and work in there. Tanks and tankers are divided up into a great number of tanks, each of which have a means to getting to them. Therefore, in addition to all the pipe lines that are running forward and aft, all of the valves,

(Testimony of Fred I. Nystrom, Jr.)

and some of them are very large valves, plus the hatches, you would have nothing but a series of obstructions. [438]

Q. I have worked on a tanker, Mr. Nystrom, I know what they look like.

A. Therefore, if you have scaffolding over here it is going to be less than the height of the men.

Q. Then your objection to the scaffolding would be that a man might strike his head while walking on the main deck, is that it?

A. That would be one of the objections.

Q. I asked you whether or not it would make a man less apt to be struck by an airplane. What is your answer to that?

Mr. Kay: What position, Mr. Harrison?

Q. (By Mr. Harrison): From standing on the platform.

Mr. Kay: On the platform, his head is above the mechano deck.

Mr. Harrison: Yes, it would necessarily have to be so.

The Court: You understand that question?

The Witness: Yes, I do, but I see no reason to believe that it would be any easier to put a man on scaffolding where he would have to stand above the mechano deck than have him on the main deck.

Q. You don't believe so? A. No.

Q. Did you ever hear of a man ducking?

A. Yes.

Q. How long have you been down here in San Francisco, Mr. Nystrom? [439]

(Testimony of Fred I. Nystrom, Jr.)

A. Monday forenoon.

Q. And did you come down solely for the purpose of testifying in this case? A. I did.

Q. And how long ago were you contacted by Mr. Black or Mr. Kay?

A. Oh, I would say a couple of weeks ago, possibly three.

Q. And they are paying you for your services, are they not? A. I hope so.

Q. Are they paying you by the day?

A. I don't know, I haven't discussed payment with them.

Q. You assume they are paying you by the day, are you not?

Mr. Kay: This is getting argumentative, now, your Honor.

The Court: Just like the lawyers are getting paid.

Mr. Harrison: These lawyers getting paid.

Q. But you came down here solely for the purpose of discussing this with Mr. Black and testifying, is that true? A. That is right.

Q. How did Mr. Black contact you?

A. By telephone.

Q. Did he discuss the matter at some length with you on the telephone? A. No. [440]

Q. Just asked you to come down and discussed it with you here?

A. Discussed it briefly, yes, asked me if I would be willing to come down and I told him I would.

(Testimony of Fred I. Nystrom, Jr.)

Q. Since you have been here how much has he discussed it with you?

A. During the recesses.

Q. You haven't been to Mr. Black's office?

A. Yes, I was in Mr. Black's office for about fifteen minutes on Monday.

Q. I see.

Mr. Harrison: I believe that is all, your Honor.

Mr. Kay: Believe me, this is just one question.

The Court: What is that?

Mr. Kay: This will only be one question.

The Court: You get that, Mr. Reporter?

The Reporter: Yes, sir.

The Court: All right, proceed.

Q. (By Mr. Kay): When Mr. Harrison asked you whether it would be more dangerous there I think you did say it would be more, and then he wanted to know why if you had a lot of planking and didn't have open space in the event something did happen, why would it be more dangerous if you had a lot of planking on here covering this area instead of the open spaces in the event a plane came down, and assuming he had [441] time to jump out of the way——

Mr. Harrison: Assuming the man is under the plane. As I pointed out at the beginning of today's examination, Mr. Kay has got the wrong idea.

Mr. Kay: I haven't the wrong idea. You are trying to give His Honor the wrong idea.

Mr. Harrison: Well, the argument is not the safety with planking under the plane, the argument

(Testimony of Fred I. Nystrom, Jr.)

is whether or not with planking he would have had to go under the plane.

Mr. Kay: Well, what has that got to do with this question?

Mr. Harrison: He keeps pushing that theory as mine.

Mr. Kay: If I had a theory that was no good at all, I could still ask the man a question about it.

The Court: Do you understand the question?

The Witness: Will you restate the question, please?

Q. (By Mr. Kay): Why would it be more dangerous, and you answered this, Mr. Harrison wanted to know, and you got into some other discussion; if you had planking, as the Government contends you ought to have on this mechano deck surface, why would that be more dangerous than if you leave the mechano deck as it was designed, and as they loaded all these ships without using planks, in the event some plane came down and a man couldn't get out of the way, or wanted to get away from there?

A. Well, for the simple reason the planks have never been used. [442] In other words, the way that deck is set up now, in case an airplane gets away or in case of accident it is a very simple matter to drop down through the beams and drop to the lower deck, but with planking on there you are not going to get out of the way.

Mr. Kay: That is all.

(Testimony of Fred I. Nystrom, Jr.)

The Court: You say you wanted to ask one more question?

Mr. Harrison: I would like to have him here tomorrow, but I don't think I will. I would like to make—no, that is all.

Mr. Kay: That is all. Thank you, Mr. Nystrom.

The Court: We will take an adjournment until tomorrow morning at 10 o'clock.

The Crier: This Court will adjourn out of respect to the memory of Daniel C. Murphy, Sheriff of the City and County of San Francisco.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m., Friday, March 21, 1952.) [443]

March 21, 1952, 10:00 A.M.

The Clerk: Luehr vs. United States, further trial.

Mr. Harrison: The last witness called was one of Mr. Kay's witnesses that was called out of order. I would like to now call one of the two stevedores which were under subpoena. Call Mr. Green, please.

FRANK DOUGLAS GREEN,

called as a witness on behalf of the respondent, U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): State your full name, please?

A. Frank Douglas Green, your Honor.

(Testimony of Frank Douglas Green.)

Q. You are not nervous, are you?

A. A little bit.

Q. Where do you live?

A. 315 Victoria Street, San Francisco.

Q. What is your business or occupation?

A. Stevedore.

Q. How long have you been so engaged?

A. About twenty-two years, your Honor.

Q. On the waterfront here? A. Yes.

Q. All during that period of time?

A. Yes. [444]

The Court: Proceed, counsel.

Mr. Harrison: Thank you, your Honor.

Direct Examination

By Mr. Harrison:

Q. Do you recall on July 28th, 1950, whether or not you were working aboard the U.S.N.S Shawnee Trail? A. Yes, I do, sir.

The Court: It will be necessary to speak up so the Reporter can hear you. The Reporter has to take down everything you say.

A. All right, your Honor.

Q. (By Mr. Harrison): Were you employed aboard the Shawnee Trail on that date, July 28th, 1950? A. Yes, I was.

Q. Do you recall that during the course of loading planes aboard that vessel a man was injured?

A. He was.

Q. Do you remember the man's name?

A. Mr. Frank Luehr, I believe.

(Testimony of Frank Douglas Green.)

Q. Can you tell us what you were doing at the time of the injury, Mr. Green?

A. I was steadying the plane down to the superstructure deck.

Q. Where were you? Were you on the main deck of the vessel or the mechano deck? [445]

A. Mechanical deck, sir.

Q. You were on the mechano deck?

A. Yes, sir.

Q. Just what were you doing to steady the plane as it came down?

A. I had hold of the wing.

Q. Hold of the wing? Were there other men aboard the plane, Mr. Green?

A. I guess there was. I didn't see them all. There was some around there.

Q. How many would you estimate there were?

A. I would say four or five. There have to be four or five to do the job.

Q. Did this plane fall, Mr. Green?

A. Yes, I would say it dropped down.

Q. And what did you do when the plane dropped?

A. I just stepped out of the way. I was just lucky enough to step out of the way.

Q. Why could you step out of the way?

A. I stepped back toward the forward part of the bridge house on the port side.

Q. What did you step back onto, do you remember?

A. Part of the superstructure, I guess it was.

(Testimony of Frank Douglas Green.)

Q. Was it the catwalk?

A. I believe it was. [446]

Q. Then you were standing—were you standing on a beam at the time you were steadying this airplane?

A. Yes, I was.

Q. When it fell, you stepped back to the catwalk, is that correct?

A. Yes.

Q. Did you have hold of anything on the plane other than the wing?

A. No, I didn't.

Mr. Harrison: I believe that is all, your Honor.

The Court: Any questions?

Mr. Resner: No questions, Judge.

Mr. Kay: No questions.

Mr. Harrison: Thank you, that is all.

(Witness excused.)

Mr. Harrison: I will call Mr. Ingbrigtsen, please.

MARTIN INGBRIGTSEN

called as a witness on behalf of the respondent, U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): How are you feeling today?

A. Not so hot.

Q. Sit back there and make yourself comfortable. What is your full name?

A. Martin Ingbrigtsen. [447]

Q. Spell that last name for the Reporter.

A. I-n-g-b-r-i-g-t-s-e-n.

Q. Where do you live?

A. 2966 23rd Street.

Q. What is your business or occupation?

(Testimony of Martin Ingbrigtsen.)

A. I am a stevedore.

Q. How long have you been so engaged?

A. Oh, about forty-five years.

Q. Where? A. On the waterfront.

Q. Here on the waterfront?

A. In San Francisco. Never left it.

Direct Examination

By Mr. Harrison:

Q. Are you still a stevedore?

A. Yes, when I am able to work.

Q. What kind of work do you do?

A. I am stevedore boss.

Q. Gang boss? A. Yes, gang boss.

Q. Do you recall if you were a gang boss with a gang that was sent out by the Jones Stevedoring Company to load the U.S.N.S. Shawnee Trail on July 28th, 1950? A. I were.

Q. You were? A. Yes. [448]

Q. Were you employed as a gang boss on that day? A. Yes, sir.

Q. And was there a man named Frank Luehr in your gang? A. Yes, sir.

Q. Do you recall whether or not Mr. Luehr was injured on that day?

A. Well, I didn't see the accident. I was watching the plane coming down, and it stopped and all of a sudden it dropped, and I got out of the way, got one of the beams over me. If I stood where I was I would have had the same as he had, almost.

Q. Were you on the main deck?

(Testimony of Martin Ingbriigtsen.)

A. I was on the main deck, yes.

Q. What were you doing on the main deck?

A. I had to be down there to see what was going on. Mr. Spirz, our walking boss, told me to send a man up there.

Q. The walking boss told you to send a man up there?

A. Yes, and this gentleman, he was nearest to me, so I asked if he would go up there, please.

Q. Just before the accident happened, Mr. Luehr was standing near to you on the same deck, is that correct?

A. Yes, he was on deck, yes, but when the plane come in I told him to go up and steady it.

Q. You told him to go up and steady the plane?

A. That was orders from Mr. Spirz; get a man up there. [449]

Q. Pursuant to orders from Mr. Spirz?

A. That is right.

Q. Did Mr. Luehr go up there?

A. He did.

Q. Did you watch what he was doing when he got up there?

A. He was standing by to steady the plane when it come down.

Q. He was standing by to steady the plane?

A. Yes. He had to get some blocks to put underneath the plane.

Q. Do you recall whether or not when the plane dropped it had been centered over the platforms?

A. No, right over the—supposed to come down.

(Testimony of Martin Ingbrigtsen.)

Q. But it hadn't come down yet?

Mr. Kay: Just a moment. I object to that as leading and suggestive, and the witness has just answered that it had. He said it was over that spot.

Mr. Harrison: I believe that wasn't his testimony, your Honor.

The Court: It is leading and suggestive.

Mr. Harrison: Yes. I withdraw the question.

The Court: It may go out.

Q. (By Mr. Harrison): Do you remember how many men were assisting in this steadying operation?

A. Well, I couldn't say exactly. Approximately above five. [450]

Q. About five? A. Yes.

Q. Were there any other men injured when the plane fell? A. No.

Mr. Harrison: I believe that is all.

Cross-Examination

By Mr. Resner:

Q. Mr. Ingbrigtsen, Mr. Luehr was working there where he was supposed to be, was he?

A. Either him or somebody else.

Q. Either him or somebody else?

A. Yes. We had to have the man there.

Q. You had to have a man there?

A. Yes, sure.

Q. Mr. Ingbrigtsen, tell me, how old are you?

A. I am—I was seventy two weeks ago.

(Testimony of Martin Ingbrigtsen.)

Q. You have been working on the waterfront now for 45 years? A. Yes.

Q. Tell me, there is a pension plan down there now, Mr. Ingbrigtsen, that gives the men \$100 a month? A. Oh, yes.

Q. You are on the plan, aren't you?

A. Yes.

Mr. Harrison: I object to this as beyond the proper scope of the direct examination. [451]

Mr. Resner: I will make him my witness for that. I want to show there is a pension plan.

The Court: You better prepare——

Mr. Resner: Just want to question him on cross-examination, then I will make him my own witness.

The Court: Very well.

Q. (By Mr. Resner): Mr. Ingbrigtsen, Mr. Luehr was working on your gang, wasn't he?

A. Yes.

Q. Tell the Judge what kind of workman Mr. Luehr was, about his ability?

A. He was a good workman.

Q. Did he follow all the orders?

A. He did.

Q. Was he conscientious? A. Yes.

Mr. Resner: All right. Now, Judge, may I make Mr. Ingbrigtsen my witness for the purpose of asking him several questions about the pension plan?

Mr. Harrison: Your Honor, please, libelant has rested his case. If he wants to call witnesses, I don't think he is entitled to.

(Testimony of Martin Ingbrigtsen.)

Mr. Resner: The man is here. Rather than call him back—just take a matter of a minute or two.

Mr. Harrison: I don't believe he could call him back. [452] He has rested.

Mr. Resner: I could call him on rebuttal.

The Court: Keep in mind this gentleman has some difficulty, and he has been here twice and he would like to dispose of it.

Mr. Harrison: I have no serious objection, your Honor. I thought maybe Mr. Ingbrigtsen would like to get off the stand and go home.

Mr. Resner: Three questions won't make it too hard. May I proceed?

The Court: Yes.

Direct Examination

By Mr. Resner:

Q. Mr. Ingbrigtsen, tell me about this pension plan down there now, what it gives the men, and what kind of service you have to have in order to get it?

A. Well, you get \$100 a month, and then if you make the thirty hours a week you get under social security.

Q. In other words, the \$100 a month pension plan is on top of whatever you get from social security, is that right? . A. That is right.

Q. This pension plan is available to men who have worked in the industry for 25 years?

A. That is right.

(Testimony of Martin Ingbrigtsen.)

Q. So you, having worked there many years more than that, are eligible to that? [453]

A. Yes.

The Court: Are you on pension now?

A. Not until after the 1st of July.

The Court: The 1st of July you go on pension?

A. Yes.

The Court: Where were you born?

A. Born in Norway.

The Court: I wish I were as rugged and strong as you are right now.

Mr. Resner: Thank you very much.

The Court: Step down.

Mr. Harrison: Thank you, Mr. Ingbrigtsen.

(Witness excused.)

Mr. Harrison: If your Honor please, I would now like to call Mr. Elzey.

FAY S. ELZEY

called as a witness for the respondent U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): What is your full name?

A. Fay S. Elzey.

Q. Where do you live?

A. 137 Carmel Street, San Francisco.

Q. Your business or occupation?

A. I am assistant chief of the procurement division, San [454] Francisco Port of Embarkation, at Fort Mason.

Q. And just what activity are you engaged in

(Testimony of Fay S. Elzey.)

in relation to your work? What is the nature of it?

A. We do all the purchasing for the Port and execute contracts for all types of services to stevedores.

The Court: All right.

Direct Examination

By Mr. Harrison:

Q. Did you hold this position on January 1st, 1950, Mr. Elzey? A. Yes.

Q. Who is your immediate superior, Mr. Elzey?

A. Mr. C. E. Higbee. He is the chief of the division.

Q. I show you, Mr. Elzey, what purports to be a contract between the Jones Stevedoring Company and the United States, effective date of January 1, 1950, expiration date of December 31st, 1950; and I ask you if you can identify the signatures on that contract?

Mr. Kay: Your Honor, I made the statement to counsel before, and I will make it again, to facilitate the trial of this case, that we will stipulate that that is the contract that was in force at the time of the happening of the accident.

Mr. Harrison: I will accept that stipulation, then, your Honor.

The Court: Very well. [455]

Q. (By Mr. Harrison): Mr. Elzey, do you have anything to do with the computation of rates that are paid under this contract?

A. Yes. Mr. Higbee does the negotiation, and

(Testimony of Fay S. Elzey.)

when he has arranged the negotiation and determined the rates, I actually compute the rates.

Q. How are the rates computed, Mr. Elzey?

A. The contract provides for payment to the stevedoring contractor on what we call a commodity basis.

The Court: Commodity basis?

A. Commodity basis.

The Court: What do you mean by commodity basis?

A. We pay the contractor so much per ton for loading different classes of cargo.

The Court: I see.

A. And tonnage rates are arrived at by determining the cost of a longshore gang for one hour; and to this direct cost is added an overriding percentage to compensate the contractor for his expenses, plus an allowance for profit.

Q. (By Mr. Harrison): Then in effect it is a, although not technically a cost-plus contract, in effect it amounts to that, is that right?

A. That is what it is. Pay the contractor's expenses plus a certain amount for profit, yes.

Q. I see. Now, you say that you do work in computing these costs, is that right? [456]

A. Compute contract rates, yes.

Q. In these costs, is there included cost of insurance covering the stevedores' operations?

A. In the overriding percentage there is an allowance for what is known as payroll insurance, which is the workman's compensation insurance,

(Testimony of Fay S. Elzey.)

State, and workman's compensation insurance, Federal.

Q. So that in effect, Mr. Elzey, the Government, who pays Jones Stevedoring Company under this contract, in effect pays the premiums on that insurance, is that correct?

A. They pay the stevedore contractor money with which him to pay the premiums, yes, sir.

Q. I call your attention, Mr. Elzey, to Section——

Mr. Harrison: Oh, if your Honor please, I may interrupt at this time to introduce this contract into evidence under the stipulation.

The Court: It may be received and marked.

Mr. Harrison: And I ask that the original may be introduced, but, gentlemen, I ask that the original may be withdrawn and a mimeographed copy substituted.

The Court: It may be admitted and marked.

(Mimeographed copy of contract referred to was admitted into evidence as Respondent U.S.A. Exhibit B.)

Q. (By Mr. Harrison): I call your attention, Mr. Elzey, to Section 14-(c) of the contract appearing on page AB-8-7-1, and [457] I will read the provisions of Section 14(c) 1 and 2, and ask you whether or not these provisions, to your knowledge, were complied with.

Mr. Kay: Your Honor, please, I object to that as incompetent, irrelevant and immaterial; no

(Testimony of Fay S. Elzey.)

proper foundation laid; and the contract speaks for itself and is the best evidence, and he is asking this witness for his conclusion and opinion on a matter that is in evidence.

Mr. Harrison: If your Honor please, the provisions of the contract which I am about to read are provisions which require the Jones Stevedoring Company to take out certain forms of insurance.

The Court: Pardon me, your question is asking this witness if the contract was complied with in that regard?

Mr. Harrison: Yes.

The Court: That is a conclusion. You must develop the fact.

Mr. Harrison: He has with him the insurance certificates, your Honor, which indicate that.

The Court: All right, develop the facts, whatever they may be.

Q. (By Mr. Harrison): I will read this portion of the contract to you, Mr. Elzey, and then question you on it.

Mr. Harrison: Section 14(c) provides:

“The contractor shall, at his own expense, [458] procure and maintain during the terms of this contract, insurance as follows:

“(1) Standard workmen’s compensation and employers’ liability insurance and workmen’s and harbor workers’ compensation insurance, or such of these as may be proper under applicable state or federal statutes. The contractor may, however, be self-insured against the risks in this paragraph:

(Testimony of Fay S. Elzey.)

“(1) If it has obtained the prior approval of the contracting officer. This approval will be given upon receipt of satisfactory evidence that the contractor has qualified as such self-insurer under applicable provisions of law.

“(2) Bodily injury liability insurance in an amount of not less than \$50,000 any one person, and \$250,000 any one accident or occurrence.”

Q. (By Mr. Harrison): Now I ask you, Mr. Elzey, did you in the course of your duties as contracting and procuring officer down at Fort Mason, receive any evidence of the contractor's compliance with these requirements of the contract?

A. Yes, sir, certificates of——

The Court: What is the answer?

A. Yes, sir.

The Court: Keep in mind the Reporter. [459]

A. Certificates of insurance were filed by the Jones Stevedoring Company showing that they carried the Federal and State Compensation insurance.

Q. (By Mr. Harrison): Were these certificates mailed to your office? A. Yes, sir.

Q. Would you state what the certificates provide?

Mr. Kay: Well, the certificates speak for themselves.

Mr. Harrison: They are not in evidence yet.

Mr. Kay: Well, that is a thing to put in. Whatever the certificates are, that is what they forwarded to him. We are not denying——

The Court: Does he have them?

(Testimony of Fay S. Elzey.)

Mr. Harrison: Yes, he has them.

The Court: Have you the certificates there?

A. Yes, your Honor.

Mr. Harrison: I have asked him what they provide, your Honor.

The Court: What do they provide?

A. One certificate covers, "Workmen's Compensation, Employers' Liability Policy, all operations of the assured under the Longshoremen's and Harbor Workers Compensation Act."

The certificates show that Jones Stevedoring Company as the assured under the policy. The policy was issued by [460] the Firemen's Fund Insurance Company. The certificate is signed by E. A. Eckworth, authorized agent of the company.

This certificate shows that the policy covers all operations of the assured under the Longshoremen's and Harbor Workers' Compensation Act. It shows that the policy has been endorsed. "In the event of cancellation the company agrees to give thirty days prior notice to the party to whom this certificate is issued.

It also shows that the policy has been endorsed. "Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against the United States of America that it might have by reason of payment under this policy."

The certificate shows it is issued to the purchasing and contracting officer, San Francisco Port of Embarkation, Fort Mason, California.

(Testimony of Fay S. Elzey.)

The other certificate shows it was a policy issued by the same company to Jones Stevedoring Company, and it shows that the policy covers usual manufacturers and contractors form of public liability policy. It shows that the policy was endorsed.

“Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against [461] the United States of America which it might have by reason of payment under the policy.”

The certificate shows that the policy provides thirty days prior notice will be given before cancellation. This certificate is issued to the purchasing and contracting officer, San Francisco Port of Embarkation, Fort Mason. It is signed by E. A. Eickworth, authorized agent.

Q. (By Mr. Harrison): Thank you, Mr. Elzey. Now, from those certificates does it appear that the United States is an assured under those policies in any way?

Mr. Kay: Well, your Honor, the certificates speak for themselves. He is asking for an interpretation here. I was trying to stipulate we have done all these things. That policy, the certificate was issued and the policy did exist at that time. That is all this gentleman would testify to.

Mr. Harrison: That is the first time that stipulation has been offered.

Mr. Kay: I told you that before the case started.

(Testimony of Fay S. Elzey.)

The Court: There is a nervous tension going on here. Proceed.

Mr. Harrison: Yes. Well, never mind. I would ask that these be admitted in evidence as respondent's next in evidence.

Mr. Kay: No objection. [462]

Mr. Resner: May I look at them?

The Court: They may be admitted and marked next in order.

(Certificates referred to were admitted into evidence as respondent U.S.A. Exhibits C and D respectively.)

RESPONDENT'S EXHIBIT C

No. C1

Compensation Certificate of Insurance

This is to certify that the following described Workmen's Compensation and Employers' Liability Policy, covering as stated, has been issued by the Firemen's Fund Indemnity Company:

Policy No.: PL-40257.

Name of Assured: Jones Stevedoring Company.

Address: 311 California Street, San Francisco, Calif:

Commencement: January 6, 1950.

Expiration: January 6, 1951.

Specific location covered: State of California.

Description of Operations or Work Covered:

Usual Manufacturers and Contractors form of Public Liability Policy.

(Testimony of Fay S. Elzey.)

Anything in the policy to the contrary notwithstanding, it is understood and agreed that the Company waives all right of subrogation against the U. S. of America which it might have by reason of payment under the policy.

The Company agrees in the event of cancellation to give 30 days prior notice to the party to whom this certificate is issued.

In event of any material change in or cancellation of said policy, the Fireman's Fund Indemnity Company will make every effort to notify the party to whom this Certificate is addressed of such change or cancellation but the Fireman's Fund Indemnity Company undertakes no responsibility by reason of any failure to do so.

Dated this 6th day of January, 1950.

Issued to: Purchasing and Contracting Officer San Francisco Port of Embarkation.

Address: Fort Mason, California.

FIREMAN'S FUND
INDEMNITY COMPANY.

By /s/ E. A. EICKWORTH,
Authorized Agent.

[Endorsed]: Filed March 21, 1952.

(Testimony of Fay S. Elzey.)

RESPONDENT'S EXHIBIT D

No. C1

Compensation Certificate of Insurance

This is to certify that the following described Workmen's Compensation and Employers' Liability Policy, covering as stated, has been issued by the Fireman's Fund Insurance Company:

Policy No.: LS-752.

Name of Assured: Jones Stevedoring Company.
Address: 311 California Street, San Francisco,
California.

Commencement: January 6, 1950.

Expiration: January 6, 1951.

Specific location covered: Territorial waters—
State of California.

Description of Operations or Work Covered:

All operations of the Assured under the Longshoremen's and Harbor Workers' Compensation Act.

In event of cancellation, the Company agrees to give 30 days prior notice to the party to whom this certificate is issued.

Anything in the policy to the contrary notwithstanding, it is understood and agreed that the Company waives all right of subrogation against the United States of America which it might have by reason of payment under this policy.

In the event of any material change in or cancellation of said policy, the Fireman's Fund Insur-

(Testimony of Fay S. Elzey.)

ance Company will make every effort to notify the party to whom this Certificate is addressed of such change or cancellation but the Fireman's Fund Insurance Company undertakes no responsibility by reason of any failure to do so.

Dated this 5th day of January, 1950.

Issued to: Purchasing and Contracting Officer San Francisco Port of Embarkation.

Address: Fort Mason, California.

FIREMAN'S FUND
INSURANCE COMPANY.

By /s/ E. A. EICKWORTH,
Authorized Agent.

[Endorsed]: Filed March 21, 1952.

Mr. Resner: Those of course are two separate policies, aren't they, Mr. Harrison?

Mr. Harrison: Yes, they are. One covers the workmen's and harbor workers' accident and the other one the liability policy.

Mr. Resner: Where the word "company" is used in those certificates, the company referred to is the Firemen's Fund Insurance Company, is that correct?

Mr. Harrison: Well, I believe as Mr. Kay says, the documents will speak for themselves.

Mr. Kay: Well, let's stipulate that is a fact.

(Testimony of Fay S. Elzey.)

Mr. Harrison: I do not enter into such a stipulation.

Mr. Resner: I think it is necessary in order to clarify it for your Honor.

The Court: Wait a minute. The contract will have to speak for itself.

Mr. Harrison: I believe that is all, Mr. Elzey.

Mr. Kay: No questions.

Mr. Resner: No questions. [463]

(Witness excused.)

The Court: Unless there is some ambiguity or something I can't anticipate at this time?

Mr. Resner: My only thought was this: The word "company" has been used sometimes loosely as between the Jones Stevedoring Company which was doing the work, and the Firemen's Fund Insurance Company which insured Jones? These insurance policies which were provided by Jones are insurance policies which were issued by the Firemen's Fund Insurance Company.

The Court: I don't think there is any question about that.

Mr. Kay: I don't think so.

Mr. Resner: No, but we just wanted to be clear about that, your Honor.

Mr. Harrison: I would like now to call Mr. Patterson.

Mr. Kay: Are those the records of the Commission?

Mr. Harrison: Yes.

Mr. Kay: We will stipulate the records Mr. Harrison has here are the official records of the United States Compensation Commission.

Mr. Magana: We join in the stipulation. You can read any portion of them, from our point of view, Mr. Harrison, and if you tell us what you want them to say we will even agree to [464] that.

Mr. Harrison: Well, just a second and I will see how I feel about that.

The Court: I will take a recess for a few minutes so you can check it.

Mr. Harrison: Thank you, your Honor.

(Short recess.)

Mr. Harrison: Your Honor, please, in the absence of Mr. Patterson, whom I understand will be here at two o'clock, I would like to call Mr. Schmitz.

Mr. Resner: Here is Mr. Patterson now, Mr. Harrison.

Mr. Harrison: Well, in that event maybe we can dispose of Mr. Patterson's testimony.

Mr. Kay: We offer to stipulate, again, they are the official records of the United States Employees' Compensation Commission.

Mr. Harrison: I would like to still obtain some information from Mr. Patterson.

The Court: Very well.

DANIEL M. PATTERSON

called as a witness for the respondent U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): Your full name, please?

A. Daniel M. Patterson.

Q. Your business or occupation? [465]

A. I am an examiner with the Bureau of Employees' Compensation.

Direct Examination

By Mr. Harrison:

Q. How long have you had that occupation, Mr. Patterson?

A. About 15 years, approximately.

Q. As such do you have under your jurisdiction the file copies of various compensable injuries suffered by one Frank Luehr? A. I have.

Q. Did you bring those files with you?

A. These files are here.

Q. Will you tell us very quickly, in a general way, the nature of the injuries received and the dates thereof?

Mr. Resner: If your Honor please, the records are the best evidence; Mr. Patterson, I am sure, has no independent knowledge, and if the records go into evidence, and we stipulate they may be admitted in evidence, Mr. Harrison can read them.

Mr. Harrison: We have not yet submitted them.

Mr. Resner: We will stipulate they can be put in evidence.

(Testimony of Daniel M. Patterson.)

Mr. Harrison: Maybe I don't want to, Mr. Resner.

Mr. Resner: We can save time. We agree they can go in evidence and agree you can read [466] them.

Mr. Harrison: Doesn't make too much difference. I think on the cross-examination of Mr. Luehr we got that pretty well straight, anyhow.

Q. (By Mr. Harrison): Can you tell from the records, Mr. Patterson, on this most recent injury of Mr. Luehr's, can you tell whether or not compensation is being paid?

A. Compensation is being paid.

Q. And can you tell what firm or insurance company is paying it?

A. The Firemen's Fund Insurance Company is paying compensation.

Q. Now, Mr. Patterson, the Compensation Commission usually classifies injuries into four different classifications: Partial temporary, total temporary, partial permanent and total permanent, is that correct? A. That is correct, sir.

Q. Asuming that Mr. Luehr in this case has a partial permanent disability, what would be the maximum that he could receive under the Compensation Act?

Mr. Resner: If your Honor please, I am going to object to this question and this line of questioning upon the ground that the statute, of which the Court will take judicial knowledge, is obviously

(Testimony of Daniel M. Patterson.)

the best evidence: Title 33, Section 901, and following, the United States Code.

Mr. Harrison: If your Honor please, all I am trying to [467] do is get these matters before the Court and save the Court the trouble of wading through all these statutes.

Mr. Resner: I submit, your Honor, the most expeditious way of going about this—counsel, I will stipulate the Longshoremen's and Harbor Workers' Act says what it does, and it is here in the book before me and it is in the Judge's chambers and it is in the Circuit Court Library.

Mr. Harrison: Let me borrow your section.

Mr. Resner: That is Section 933. Do you want the benefit section?

Mr. Harrison: I want the section that sets the maximum at \$11,000.

Mr. Kay: Wouldn't it facilitate this, I will stipulate that that is so.

Mr. Harrison: Then perhaps we can dispose of it.

Mr. Resner: Yes, we will stipulate to that, Judge.

Mr. Harrison: If the man has what they would classify partial permanent disability, that the maximum which he is entitled to under the Longshoremen's and Harbor Workers' Compensation Act is \$11,000, is that the stipulation?

The Court: Is that stipulated, gentlemen?

Mr. Resner: Yes. And I will ask Mr. Harrison to stipulate that if he has total disability and got

(Testimony of Daniel M. Patterson.)

compensation he would get \$35 a week for the rest of his life.

Mr. Harrison: I will not stipulate to that. [468]

Mr. Resner: But these benefits are unrelated to the right to sue a third party under Section 933.

Mr. Harrison: If you think I am going to stipulate to that, Mr. Resner——

Mr. Resner: Isn't that in the law just as much the total partial?

Mr. Harrison: That is not my interpretation of the law and I would not stipulate the man is entitled to \$35 a week.

Mr. Resner: Then I withdraw my stipulation and submit to your Honor the law speaks for itself and your Honor will take judicial notice of it.

The Court: I will. It is my duty to do so.

Mr. Harrison: All right, your Honor. Then I would like, pursuant to the stipulation, to introduce the record into evidence.

The Court: No objection? Let it be admitted and marked.

(Record referred to was admitted into evidence as Respondent U.S.A. Exhibit E.)

Mr. Harrison: That is all, thank you.

The Court: Any questions?

Mr. Kay: None at all, your Honor.

Mr. Magana: May I ask a question?

(Testimony of Daniel M. Patterson.)

Cross-Examination

By Mr. Magana:

Q. Do these records you gave the Clerk [469] just now constitute all the records and the total file you have on Mr. Luehr?

A. That is correct, to the best of my knowledge.

Q. And they will indicate how much time he lost from work insofar as the Commission would know it on account of the specific injuries?

A. That is correct.

Mr. Magana: All right, thank you.

(Witness excused.)

Mr. Harrison: I will now call Mr. Schmitz.

ANDREW F. SCHMITZ

called as a witness for the respondent U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): Your full name, please?

A. Andrew F. Schmitz—S-c-h-m-i-t-z.

Q. Where do you live?

A. 1208 Sanchez Avenue, Burlingame, California.

Q. What is your business or occupation?

A. Safety consultant, United States Department of Labor, Bureau of Labor Standards, Federal and Maritime Safety Section and Pacific Coast Section.

Q. What is the nature of your work?

A. Promotional and advisory in regards to accidents and prevention of accidents and minimizing injuries. [470]

(Testimony of Andrew F. Schmitz.)

Direct Examination

By Mr. Harrison:

Q. What other safety work have you had during the course of your lifetime, Mr. Schmitz?

A. I was regional safety supervisor for the Waterfront Employers' Association of the Pacific Coast, the Puget Sound and Columbia River District, from April, 1943, through November, 1945. Prior to that I was deputy commissioner for the United States Employees' Compensation Commission under the Longshore and Harbor Workers' Compensation Act, 15th District, Honolulu, T. H., October—rather, November, 1940, through October, 1941.

Prior to that I was manager of the Accident and Prevention Department and Personal Injury Claims and Accident Prevention Department, Castle and Cookes Terminal, Limited, Hawaii.

From October, 1941, through April, 1937. Prior to April, 1937, I was secretary of the Industrial Accident Board, City and County of Honolulu, through 1927, from 1927 through 1924 I was inspector, city and county of Honolulu Industrial Accident Board.

The Court: What are you presently?

A. Official of the Department of Labor, Bureau of Labor Standards, since November, 1945.

The Court: All right.

Q. (By Mr. Harrison): It is safe to say you have been [471] connected with safety work and

(Testimony of Andrew F. Schmitz.)

accident prevention work the greater majority of your life? A. That is correct.

Q. In the course of your previous employment and present employment, do you come in contact with the Pacific Coast Maritime Safety Code?

A. I do.

Q. Are you thoroughly familiar with the provisions of that Code? A. I am.

Q. In the course of your experience have you had occasion to familiarize yourself with a superstructure built on tankers, which is commonly called a mechano deck?

A. I have seen the vessels carrying such superstructures, yes.

Q. Would you say that model over there would fairly accurately represent what you have seen?

A. I think it is a good representation of a mechano deck.

Q. And in the course of your work have you had occasion to familiarize yourself in a general way with operating practices involved in stevedore operations on all sorts and types and descriptions—in a general way?

A. Well, in a general way, yes.

Q. In the course of your present employment, what do you do when an accident is called to your attention and you take [472] the facts under surveillance? What is your course of operation?

A. We do not investigate accidents, specific accidents, as such. We have available to us, all of those injuries that are reported to the deputy commis-

(Testimony of Andrew F. Schmitz.)

sioner under the Longshoremen's and Harbor Workers' Compensation law to cover all Maritime employment under that Act, and have available all the injuries reported under the Federal Employers Compensation Act of 1916 to cover the injuries under that Act.

We review these injuries and determine the accident causes. We prepare studies and make recommendations for accident prevention and injury prevention, minimizing the seriousness of injury, and such work as that kind.

Q. I see. You prepare studies of the methods to use?

A. Well, in preparing the studies we determine the corrective measures that we are going to recommend, by seeking out all accident circumstances that relate to the conditions, methods, acts, involved in the particular accident relating to inherent as well as potential matters. [473]

Q. I see. Do you have a short phrase that you use for that particular—

A. Well, we—well, we cause analyze the accident.

Q. You cause analyze an accident?

A. We cause analyze an accident.

Q. I see. Well, then, Mr. Schmitz, just to demonstrate to the Court what the cause analysis is let me give you a state of facts and see if you will run an exemplary causal analysis on it. Let us assume that some sort of a heavy unit of cargo is being loaded on one of these mechano decks and

(Testimony of Andrew F. Schmitz.)

that the cargo has been lowered by shoreside or floating crane to within several feet of the mechano deck; let us further assume that while this cargo remains suspended on a bridle or hooked to a fall of the crane it becomes necessary to steady the swing of this heavy cargo and guide it in to a particular resting place on this mechano deck. You follow me so far? A. I do.

Q. Now, let us assume that the man in charge of the stevedoring gang employed to load this cargo then asked one of his men or directed someone to walk out on one of the beams of the mechano deck to steady and guide that cargo as it was coming in or as it was stopped in that position, and that this man then went out on the mechano deck, onto the deck itself without the aid of walking boards or platforms, and [474] he stood on the beams of the mechano deck with his hands on this cargo. Follow me so far? A. I do.

Q. Let us assume further that while this man is poised on this mechano deck the operator of the crane which is holding this suspended cargo leans forward in the cab and looks out of the window and accidentally catches his sleeve on the gear that holds the cargo suspended, that the cargo drops to the mechano desk striking the man poised on the beam, knocking him eventually to the main deck and injuring him.

Now, assuming first of all that there are no mechanical defects in the barge, let us eliminate that from your causal analysis, assume there is no me-

(Testimony of Andrew F. Schmitz.)

chanical defect in the barge or the equipment, will you run as best you can from this short question a hypothetical causal analysis on that? A. Yes.

Q. On those state of facts.

A. We would go first to the source, the initial source of the accident, that is, the accident initially started on the derrick barge. Assuming that there is no mechanical defection on the barge or its gear or equipment, we would then determine that supervision of the operator of the derrick would need to be improved. In other words, we would expect the supervisor to not permit men to operate if they had loose, floating garments that could hook up on projections [475] that might cause a loss of control.

We would expect the workmen to come properly clothed to prevent such an accident.

We would then consider the load that was suspended from the cargo hook and the method in which it was being handled, and we would consider or we would recommend that the load be handled either by guide lines manner in such a way so that the workmen manning the guide lines so that in lowering the load or positioning the load would not be unnecessarily exposed to the hazards, to the accident-producing circumstances in that type of an operation.

We would like to, we would probably recommend—well, let us say we would recommend that the men, if practicable, remain on the main deck in order to handle the tag lines until the load was in position for lowering and placing.

(Testimony of Andrew F. Schmitz.)

If that were impracticable we would recommend that they be stationed on platforms on the main deck so that when it became necessary to handle the load they could handle it from shoulder height without unnecessarily exposing themselves to a suspended moving or swinging object.

If that were impracticable we would recommend that step-up platforms, probably designed for the purpose suspended from the beams be used. And if these were not available we would recommend that they use scaffolding across the fore and after or thwartship beams to provide a safe [476] footing for the men engaged in the operation of steadying and landing the load so that in the event of any unforeseen incident the men would have an opportunity to get to cover.

Q. I see. Then from that casual analysis would you say that the failure to provide safe footing in the hypothetical question which I have given you was one of the contributing causes in this injury?

Mr. Kay: Just a moment. I object to that as incompetent irrelevant and immaterial, no proper foundation laid, calling for the conclusion and opinion of the witness and the fact that the facts of this accident were not fully related to the witness.

Mr. Harrison: In what manner, Mr. Kay?

Mr. Kay: Well, for one thing the question assumed that this load was up several feet from the deck. Now, obviously if it was up suspended overhead, where the man couldn't handle it, the load, it is one thing; if it is down to the level of shoulder

(Testimony of Andrew F. Schmitz.)

high where the men could handle it, that is another.

Mr. Harrison: I took the precaution of writing the question out and reading it very carefully to avoid such an objection. The question supposed that the load had come down to where the men could get their hands on it.

Mr. Kay: You said several feet, and you can't get your hands on the load in several feet, might be seven feet up [477] in the air.

Mr. Harrison: Then I will certainly add that particular fact to the question that the load is down within shoulder height of the man.

Q. Would that change your answer at all, change your causal analysis of the accident?

Mr. Kay: The rest of our objections, your Honor, are made again to this same question, even in that reframed——

The Court: I suggest you reframe your question.

Mr. Harrison: The whole hypothetical question, your Honor? [478]

The Court: I suggest to you that you reframe your question. I will sustain the objection so the record is clear.

Mr. Harrison: Would you read the last question, Mr. Reporter?

(Record read by the Reporter.)

Q. (By Mr. Harrison): Well, put it this way, Mr. Schmitz: I was merely trying to clear up what the witness said, I believe, in his causal analysis,

(Testimony of Andrew F. Schmitz.)

He said that they would recommend some kind of safe footing for these men.

The Court: I understand.

Mr. Harrison: That was merely the point I was trying to get at, that he found in his causal analysis that the failure to provide this was one of the causes——

The Court: To provide what?

Mr. Harrison: Safe footing for the men to work.

The Court: Establish the facts of what is a safe footing in the conditions existing here.

Q. (By Mr. Harrison): You recommended, you say you would recommend under this hypothetical state of facts that some sort of a platform be slung from the beams, is that correct?

Mr. Kay: Just a moment. I object, your Honor, on the ground the hypothetical question is still not complete, and in fact it omits very important factors here. Counsel wants to know—I have no point here in trying to propose the [479] hypothetical question for him, that is his function—but there are many factors here as to the condition of the barge, the vessel, the sea, and the particular type of load. All of those factors is a part of the case here. I mean, he is just giving him a general situation.

Mr. Resner: Also the fact, your Honor, that on these tankers, and the reason they have the mechano deck structure is because on the main deck there are tank tops, pipelines, other things that require the mechano deck over it. That prevents the lowering

(Testimony of Andrew F. Schmitz.)

of the plane on the deck itself. The very construction of the vessel is a primary factor in this whole situation.

Mr. Harrison: As far as a mechano deck on a T-2 tanker, the man is familiar with them, and familiar with the mechano deck.

Mr. Kay: No proper foundation as to whether he has been aboard this particular type with the kind of equipment underneath the mechano deck. I think there is no proper foundation. I make that objection, I made it before, and I renew it again here.

Mr. Harrison: I submit the man testified he has observed this situation.

The Court: You can lay a better foundation.

Q. (By Mr. Harrison): Have you, during the course of your experience, Mr. Schmitz, observed mechano decks built on what [480] we commonly call T-2 tankers? A. I have a few.

Q. I see. A. Not many.

Q. Have you observed that on the main deck of the vessel there are frequently many superstructure obstructions, tank tops, and oh, I imagine winches, pipelines, that sort of thing on the main deck?

A. There are many projections on the deck.

Q. Yes.

Mr. Harrison: Your Honor, Mr. Kay's objection to the hypothetical question which I have posed seems to me to be entirely spurious. He has suggested that I go all over the details about what kind of a barge it was and what kind of a rig they were

(Testimony of Andrew F. Schmitz.)

using, and what time of the day it was, and how old Mr. Luehr was, which is presently inconsequential. I think I have outlined a very fair question from what the evidence has shown.

The Court: I don't question your fairness at all.

Tell me, have you had occasion to familiarize yourself with the unloading and loading of these airplanes?

The Witness: To answer the question specifically, no, I have not, familiarized myself with the loading or unloading of airplanes on that particular type of a vessel.

The Court: On any other kind of a vessel? [481]

The Witness: Many, yes, all types.

The Court: With this outlined here, are you familiar with that?

The Witness: Yes, sir, I have seen ships equipped with such superstructures.

The Court: Similar in character?

The Witness: Yes, sir.

The Court: Proceed.

Mr. Harrison: Thank you, your Honor.

Q. Now, to get the record straight, Mr. Schmitz, in your causal analysis of this accident, would you for us sort of boil it down to one or two or three main contributing causes?

Mr. Kay: Pardon me, your Honor, I am going to object to the form of the question, and also on the ground it is incompetent, irrelevant and immaterial, that no proper foundation has been laid, and that it would call for the conclusion and opinion of

(Testimony of Andrew F. Schmitz.)

this witness on a matter with which he obviously wouldn't be qualified as an expert.

Mr. Resner: May I offer an objection? I don't like to interrupt here, but frankly what Mr. Harrison is trying to get the witness to do is to assume the Court's function and decide the ultimate fact that is before the Court.

The Court: Embodied in the examination here, the witness, if I followed it, and I will stand corrected, he made recommendations under certain conditions existing. [482]

Mr. Resner: That is correct, I have no objection to that, Judge, but when Mr. Harrison says boil it down to one or two or three causes——

Mr. Kay: That is right.

Mr. Resner: He is asking the witness to explain why the accident happened, but that is what we are handing up to your Honor to decide.

Mr. Kay: That is why I objected to the form of the question.

Mr. Harrison: Your Honor please, I anticipated that particular objection, took the trouble to do a little research on the matter. I believe that it is perfectly all right for an expert in safety to testify as to what, in his opinion, were the causes of the accident.

The function of the Court is to determine whether or not any of these causes were brought about by negligence.

Now, I am not asking the witness to testify whether or not there was negligence in this case,

(Testimony of Andrew F. Schmitz.)

I am asking him to cause analyze the accident. That is his business, and he is an expert in what causes accidents and I am asking him to testify on that particular point. He is not to testify to the Court's ultimate, the ultimate issue which is before the Court as to whether or not the accident was caused by any negligence on the part of anyone. I submit——

The Court: If I followed your argument, as far as he [483] went, he indicated that what he would recommend under certain conditions, and you might go that far here.

Mr. Harrison: I see. Well, I will then rephrase the question this way.

The Court: Do I make myself clear?

Mr. Harrison: Yes, your Honor.

Q. Assuming the facts which I have related to you, Mr. Schmitz, would you recommend that some form of safe footing be provided in this operation?

A. I would.

Mr. Kay: Just a moment. Your Honor, I am going to object on the ground it is incompetent, irrelevant and immaterial; that no proper foundation has been laid specifically in that the witness couldn't possibly be qualified to testify with that, your Honor, to that question for the very reason that he has stated he has never seen any loading operations on a mechano deck.

Now, your Honor did ask him whether he had seen other types of loading, but this case is going to turn on the situation involved in the mechano

(Testimony of Andrew F. Schmitz.)

deck and the loading on main decks, or in between decks, in the lower holds, couldn't be comparable to this situation.

The Court: I will answer you now. You interrogate the witness.

Mr. Kay: If counsel is finished, I certainly will be [484] glad to.

Mr. Harrison: Certainly not.

The Court: Well, you're making an objection, I want to get him into the record within reasonable limits; I don't want to do violence to the law. But I am not altogether satisfied that if he is not familiar with the conditions existing here, might go to the weight of his testimony, but for example, let us hear the question. Will you read the question?

(Question read by the Reporter.)

Mr. Kay: There, your Honor, what operation? He has described a certain operation. This gentleman obviously has never seen that operation. To be sure, you may ask him a hypothetical question for an answer of that sort if you lay all of the proper foundation. I don't think he knows now what the conditions were under which this loading operation was undertaken.

The Court: Well, I am going to do what I usually do on these matters, going to allow the testimony to go in subject to your motion to strike and over your objections. That will give you a proper opportunity to cross-examine him, if you want to.

(Testimony of Andrew F. Schmitz.)

Mr. Kay: Thank you, your Honor.

Mr. Harrison: Thank you, your Honor.

Q. Then your answer to that question was you would recommend [485] some safe footing be provided? A. That is correct.

Q. Could you give us in more detail the particular type of safe footing?

Mr. Kay: So that the record may be clear, my objection will go to this entire line of questions.

The Court: Let the record so show.

Q. (By Mr. Harrison): What particular type would you recommend?

A. In making such recommendations we are generally guided by the minimum standards for safety that prevail in the state where the recommendation would be made.

The minimum standard for safe footing in the State of California would be a width of three feet so that I would expect the planking to be at least three feet wide with a sufficient overhang on the lateral beams supporting it so that there would be no danger of it sliding off, and I would expect the planking to be adequately secured so that it could not shift. And if there were danger of the men falling off that mid-rails and top-rails, if necessary, be provided. However, where that could not be done, equivalent precautions would be—well, the precautions would be equivalent if the surface were made a little bit wider.

Q. I see. You mentioned platforms below, slung below. Would you recommend that as an alterna-

(Testimony of Andrew F. Schmitz.)

tive measure if walking [486] boards or planking, scaffolding, were not available or not practicable?

A. I would, yes.

Q. And how would you recommend that be carried out?

A. Well, it would be necessary to design and construct step-up platforms made for the purpose that would be readily suspendible from any of the beams and would provide a reasonably wide safe footing for the men to step up upon and be in position to reach the cargo when it came within their reach, say at shoulder height.

Q. Now, assuming that such a structure had not been built, would you say that the next best step would be to suspend boards with lines of wire hooks of some sort?

Mr. Kay: Of course, this is leading. I think Mr. Schmitz did mention something like that.

Mr. Harrison: I believe he did, yes.

Q. I interpreted your testimony to say that if no step-up platforms were provided, the next alternative would be to hang, suspend from the beams some sort of a platform?

A. When I said suspend from the beams, I didn't mean it on wire or on hooks, which of themselves, would create additional danger. I meant a specially constructed step-up platform that would be solid when it was fixed in place. The other recommendation is in the record.

Q. Mr. Schmitz, you have testified that you are familiar [487] with the Pacific Coast Marine

(Testimony of Andrew F. Schmitz.)

Safety Code. I call your attention to Rule 911, which reads as follows:

Perhaps we should like some foundation on this code, Mr. Schmitz. How long has this Code been in operation, do you know?

A. Well, the Code has been in operation since prior to 1931. I think it went into operation the first time in about 1929.

The Court: Changed at all since that time?

The Witness: Yes, sir, there were several revisions.

Q. (By Mr. Harrison): And what is the purpose of the Code?

A. The purpose of the Code is to prevent accidents and minimize seriousness of injury, reduce the injuries in the longshore work.

Mr. Resner: Your Honor, Rule 102 states the purpose of the Code. The purpose of the Code is to provide minimum requirements for safety of life, limb and health.

The Witness: That is stated, perhaps, better than I did.

Q. (By Mr. Harrison): Who are the parties to the Code?

A. Well, the parties to the Code are all the members of the Pacific Maritime Association and the unions that they contract with, and the men whom the unions supply to do the work under that contract.

Q. I see. Does the Code have any mandatory effect upon any of these parties?

(Testimony of Andrew F. Schmitz.)

Mr. Kay: Your Honor, there again he is asking this [488] witness to give his opinion on a matter which is in writing here. The Code speaks for itself. I object to that question.

Mr. Harrison. If your Honor please, if we just say that the contract speaks for itself, the Code speaks for itself all you have before your Honor is a great mass of papers which you would undoubtedly have to wade through——

The Court: I will be burdened in any event. If there is anything that you wish to read into the record, you may do so, and then you will have a record.

Mr. Harrison: All right, thank you, your Honor.

The Court: I say that kindly.

Mr. Harrison: I would like to establish the fact that this does appear in the foreword of the Code, which I will now read:

“The Code was adopted at special meetings of the Pacific Coast Marine Safety Code Committee held in San Francisco, August 2, 1929; Portland, August 19, 1930; Los Angeles, November 6, 1931; and San Francisco, October 21, 1932, and remained as a voluntary Code until its inclusion in the November, 1946, return-to-work agreement when it was included in the longshore contract by the Waterfront Employers Association of the Pacific Coast and the ILWU.”

Q. Now, Mr. Schmitz, I call your attention to Section 911 of this Pacific Coast Marine Safety Code, where it states: [489]

(Testimony of Andrew F. Schmitz.)

“When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. Drafts should be lowered to shoulder height before longshoremen take hold of them for steady-ing or landing.”

Now, do you believe, as a safety expert, that the facts which I have outlined to you in any way violate that specific provision of the Safety Code, either in letter or by analogy?

Mr. Kay: I object to that, your Honor, as being incompetent, irrelevant and immaterial, no proper foundation, calling for the opinion and conclusion of this witness. The Code speaks for itself, and also invading the province of the Court. That is for the Court's ultimate determination, he is asking this witness to decide the case, and then suggests that it goes to his weight. We could produce a half a dozen witnesses right now that would testify the other way as he is asking him to testify.

The Court: It occurs to me the witness on the stand, the longshoremen—what was his name?

The Witness: Mr. Ingbriksen.

The Court: He was there and he got out of the way, jumped out of the way.

Mr. Harrison: I realize that, your Honor. [490]

The Court: Well, to say that you may or may not get under a load under certain conditions, you will have to be guided by the facts and the testimony from this record. Under the conditions exist-

(Testimony of Andrew F. Schmitz.)

ing I can see how he can get under this plane and get under these others——

Mr. Harrison: Well, if your Honor please——

The Court: I think you are entitled to read the rules if they have any application; I will have to make the determination on the facts proved.

Mr. Harrison: I see, your Honor. I was merely trying to assist the Court in having here an expert on safety who can tell us whether or not in his opinion these facts would constitute a violation of these rules.

Now, I am not—I don't believe that that invades the province of the Court. The Court could, could well find that these rules were violated but that no negligence existed. Now, that is the only province, as I see it, the Court has here is to determine whether or not there was negligence.

The Court: Well, I have to determine that from the facts proved. You are entitled to read that regulation into the record. It will be finally for me to make a determination on it myself.

Mr. Harrison: As to whether or not there was a violation of the regulations, your Honor?

The Court: Yes. If I am in error about it, I will have [491] anybody correct me on it. That is my thought.

Mr. Resner: Furthermore, the Rules, your Honor, set up a standard of conduct that the parties have agreed upon among themselves. The absence or presence of negligence, or absence or presence of unseaworthiness is still the ultimate fact that

(Testimony of Andrew F. Schmitz.)

your Honor will have to decide independently of the standards that the parties have created.

Mr. Harrison: That is exactly my argument, your Honor, and now what I am asking is an expert in this Code to testify whether or not in his opinion the standards have been violated.

Mr. Resner: But that is the judge's province.

Mr. Harrison: You said it wasn't—

Mr. Resner: You want him to read back what I said, Mr. Harrison?

The Court: Off the record.

(Off the record discussion.)

Mr. Harrison: If your Honor please, that is in substance the testimony which I hoped Mr. Schmitz could give us, and because Mr. Kay is so competent in making objections, I don't think I can get it on the record. I will dismiss Mr. Schmitz. I have no further questions.

The Court: Take the witness.

Mr. Resner: I yield to Mr. Kay.

Mr. Kay: I have no questions. [492]

The Court: I trust we didn't abuse you?

The Witness: Not at all. I hope I was of some help.

The Court: I do violence to some of our procedure, but I take that responsibility. I could very well be criticized for many things I do here, but I can't get as legalistic as some of my brethren. I have seen too much of life for that.

Now, then, what is the next step?

Mr. Harrison: Your Honor please, I haven't scheduled another witness until 2 o'clock this afternoon. At that time I believe we will have only one further witness.

Mr. Kay: One witness and then that will be your case, is that correct?

We will be prepared to go on, then, your Honor.

Mr. Harrison: Are you going to call some—

Mr. Kay: We were planning to put on some on Monday, as your Honor will remember.

The Court: We can still—you know, I have burned by a lot of energy in my younger days trying to accomplish almost the impossible, but I have suspended that order of things. Whatever witnesses here today we will hear them, and if necessary we will go over to Monday.

Mr. Kay: Thank you. We will have some here, I am pretty sure.

The Court: I used to put a lot of steam on.

Mr. Resner: You are still putting on a lot of steam, Judge. [493]

The Court: I say that advisedly. I want everybody to have a full opportunity to build up any record they may make here so that in the event I happen to go up the wrong street they have their day in court and can go over to the Circuit Court where it will get the attention of three judges instead of one.

We will take a recess until 2 o'clock.

(Thereupon a recess was taken to the hour of 2 o'clock p.m. this date.) [494]

Friday, March 21, 1952, 2:00 o'Clock P.M.

Mr. Harrison: As I said this morning, the Government has one final witness that I would like to call at this time. Will you please take the stand, Mr. Lehmkuhl.

CHARLES R. LEHMKUHL

called as a witness for the Respondent U.S.A., being first duly sworn, testified as follows:

The Court: State your full name, please.

A. Charles R. Lehmkuhl.

Q. Where do you live?

A. In Oakland, sir.

The Court: Your business or occupation?

A. I am a civil service employee at the Naval Air Station, Alameda.

The Court: What is the nature of your work?

A. Now I am supervisor of the supply department personnel.

Direct Examination

By Mr. Harrison:

Q. What position did you hold before you became supervisor of the supply department?

A. I was in charge of the loading dock during the war when we loaded planes aboard tankers, freighters, every type of ship that came in.

Q. What was the title of that job? [495]

A. Quarterman rigger.

Q. Quarterman rigger? How long have you

(Testimony of Charles R. Lehmkuhl.)

been engaged in operations concerning loading of vessels?

A. About the middle of 1942 when we loaded Jimmy Doolittle's Shangri-La gang on the Hornet.

Q. During your experience with these loading operations have you had occasion to come in contact with the mechano deck built on tankers?

A. Yes, sir.

Q. And directing your attention to this model over here, does that accurately or fairly closely represent the mechano deck?

A. A portion of it, yes, sir.

Q. A portion of a mechano deck?

A. Yes, sir.

Q. On how many of these mechano decks would you say you have supervised the loading of airplanes?

A. Oh, fifteen, eighteen, twenty. I wouldn't give you any firm count.

Q. What was your specific job with respect to the loading of these airplanes?

A. I supervised the job of loading them.

Q. I see. When you undertake to load these airplanes, Mr. Lehmkuhl, what men are used over in the Naval Air Station? Are they [496] stevedores?

A. No, sir, we have no stevedores. We use our civil service employees. We had what we called a security crew, a combination of carpenters, blockers and bracers and riggers.

Q. Are these men trained or experienced, qualified in any way?

(Testimony of Charles R. Lehmkuhl.)

A. Only what training we gave them ourselves. If I may digress a little bit, we were not completely organized over there when the war broke out. We were in the process of organizing our department on our job over there, and we hadn't hardly learned to walk yet, if I could use the expression——

Q. Yes.

A. ——and the war hit us and we had to get up and run like the dickens, organizing and doing the job at the same time. We hired what we could get, and sometimes they weren't too good.

When we started shipping planes, we organized the security gang, we called it, a combination of carpenters, blockers and bracers, riggers, few of whom had had previous experience around ships. We didn't require any experience because we trained them ourselves in our work. Our work was a little bit different than we had run into before and we trained the people.

Maybe the work was aboard carriers, flat tops. We [497] trained the people handling our aircraft, loading them, securing them aboard the carriers or flat deck and hangar deck.

Also we were required to load aboard freighters and tankers with the mechano deck. Our people were—at the time I guess we got the first mechano type carrier in there we had probably been in operation eight, nine, ten months, maybe. I have no very good idea of the dates.

Q. I see.

(Testimony of Charles R. Lehmkuhl.)

A. Obviously, being aboard a tanker with the mechano deck, we used the men experienced—the more experienced men of our personnel. Required much smaller gangs. We seldom ever had more than twenty, twenty-five people aboard a tanker and with the more experienced people in the gangs, whereby a tanker would use the whole gang, up to a hundred or more.

Q. All right. Why did you use the more experienced people?

A. Because of the type of work we were doing. I mean, the mechano deck presented a certain amount of hazard.

Q. I see. Would you tell us in your own words, Mr. Lehmkuhl, what was your standard operating procedure when loading planes when the operation was under your supervision?

The Court: Did you load from a dock or a tanker or what?

A. We loaded from both dock and barges, on the offshore side. [498] Our first thought was to get either a—if I may back up a little bit—first, a scale model of the aircraft, a little piece of plexiglass cut to scale. If we were not able to secure a model of the deck the same scale as the aircraft, we drew up such a model and put in all the necessary obstructions. We laid out the deck.

The next job, after we got the deck laid out, we would spread a load of lumber aboard the carrier in some spot on the mechano deck where it would not be in the way of the moving, portable

(Testimony of Charles R. Lehmkuhl.)

beams, to the proper place to provide footing, a kind of huge T-square to tell where the wheels would come.

We lay out the deck, put in the footings. After the first footing was prepared the plane would come aboard, while the gang went ahead and prepared more footings the first plane would come aboard.

The Court: Pardon me. Would you place your footings as you went along?

A. No, sir, the gang moved in and steadied and braced the footings.

Mr. Harrison: I think by "footings" the witness means the platforms.

A. Where the wheels land.

The Court: That is these footings?

A. Yes, for the starboard, port wheels and the tail wheel. [499] The plane would come aboard secured with normally about three taglines. Riggers on the dock would hold the tag lines until they got aboard ship, then the riggers aboard ship would take the taglines. In some cases the men aboard ship would be on the catwalk, and other cases on the deck—mechano deck, and in many cases on the mechano beams. If they happened to be adjacent to where we keep this pile of lumber they would throw out a few planks to walk on.

That procedure was followed until the plane was over the footing and the wheels just about touching the deck. In other words, there was about five to seven inches slack in the oleo—that is the structure

(Testimony of Charles R. Lehmkuhl.)

where the wheels was. There is fluid in that oleo strut that provides resiliency.

Q. (By Mr. Harrison): Sort of a shock absorber?

A. Shock absorber. When the wheels would strike the footings, then the men would turn loose the taglines and actually physically contact the plane, sometimes either by the edge of the wing or the horizontal stabilizer aft, or in some cases they would handle it by the prop. The plane was dropped till the slack was just about out of the line, maybe an inch or so slack left, and a fellow would step underneath and set the wheel cogs.

Q. When the plane came over, and just before it was to be set down on the platform, it is sometimes necessary to steady it, is it not? [500]

A. Yes, sir.

Q. Is it necessary for any of the men to go underneath the airplane to steady it?

Mr. Resner: I believe, your Honor, that is not a situation that exists in our case. Their operation is different, and I think not an appropriate example; certainly no bearing on the problem before the Court.

Mr. Harrison: I submit it is far more analogous than Mr. Nystrom's experience.

The Court: Wouldn't that go to the weight of the testimony?

Mr. Resner: Perhaps so, your Honor.

The Court: Very well, objection overruled.

Mr. Harrison: Would you read the question?

(Testimony of Charles R. Lehmkuhl.)

(Question read by the Reporter.)

Mr. Kay: Your Honor, may I interrupt and interpose my objection for the record that it is incompetent, irrelevant and immaterial; no proper foundation laid; outside the issues of this case, and not based on any evidence here as to that type of loading.

The Court: It is remote, but I will give him a record on it. I think it goes to the weight of the testimony. Objection will be overruled. Proceed.

Q. (By Mr. Harrison): Do you know what the question is, now? [501]

A. It wasn't absolutely necessary for people to go under the plane. Some of my people did it and were reprimanded rather sharply for it.

Q. I see. Have you ever had any planes drop?

A. Yes, sir.

Q. You said one of the first things you do when preparing to do this loading operation is to sling a load of lumber aboard. Where did you land that load of lumber? A. No one certain place?

The Court: Wherever there was room for it?

A. Wherever our layout shows it won't be in the way.

Q. What is the purpose of that lumber?

A. We used that lumber to block up under the landing gear of the airplane after we had moved the portable beams into place.

Q. Is it your testimony that the stevedores, or the men who were used as stevedores, would take that lumber and use it to walk about on?

(Testimony of Charles R. Lehmkuhl.)

A. In some cases they would.

Mr. Kay: Oh, your Honor, see how leading that is? I assume some of the stevedores on these occasions might have, but that is a leading question. I object to the form of the question.

Q. (By Mr. Harrison): Did the workmen ever use the lumber to provide footing for themselves?

A. Yes, sir, they did. Some cases where the deck was clear [502] enough underneath we had tables provided, oh, about, I would say, four, four and one-half feet high, where fellows stood underneath the mechano and steadied the plane, set the wheel plugs in, whatever was necessary, while the plane was on the way down.

Q. What was the purpose of that table?

A. It was for a safety factor.

Q. To avoid having the men going up on the mechano deck?

A. That is right. Not all occasions was that practical, because an obstruction on the deck—we would provide that for such places as where there are valves and pipes, and not where the tanker deck was clear.

Q. When it was practical, you used it?

A. That is right.

Mr. Harrison: That is all.

Cross-Examination

By Mr. Resner:

Q. You said you have had some planes drop on you?
A. We have had, yes, sir.

(Testimony of Charles R. Lehmkuhl.)

Q. Was it either a failure of human beings, or the failure of apparatus which caused that to happen?

A. Well, I would say failure of human beings, when we dropped the rig when it was too far away, try to reach too far with the crane.

Mr. Resner: That is all. [503]

Cross-Examination

By Mr. Kay:

Q. Mr. Lehmkuhl, these planes you are talking about that you have directed, several of them have wheels and others—

A. In most cases we did, yes, but we have loaded planes for the army that set on—

Q. Tripods? A. Sometimes.

Q. Tripods? A. Tripods, yes.

Q. On the ones where you have wheels and they will take the shock of five or six inches when they land on platforms, you don't expect much damage, is that correct?

A. I don't quite understand the question.

Q. If that plane is dropped down with the wheels striking the—I mean lowered down until the wheel hits the platform, there is a give of five or six inches? A. Yes.

Q. If they drop a little further than that, then they light onto that platform, or more force, they would take up some of that shock, is that right?

A. It is taken up in all cases, sir, as it hits the platform the oleo struts are still active.

(Testimony of Charles R. Lehmkuhl.)

Q. But the wheel is the part of the assembly that takes the shock? [504]

A. Yes. They are attached to the lower part of the oleo.

Q. When you have the strut complete with wheel, you have to be more careful in landing that, isn't that right, on the platform?

A. Well, I don't believe so. We expect a certain amount of cost. After all, we were interested in the airplane, not in the wheel.

Q. I appreciate that, but if the load—if the plane is lowered, rather, further than it normally would be, the wheel takes a certain shock?

A. If it is over a foot or so. There is a certain amount of resiliency to the tire.

Q. But with tripods on, if it hits with the same force, you are liable to injure the tripod or disengage it, isn't that right?

A. There is more probability, yes, but the oleo structure absorbs the shock. If I may digress and enlarge on my statement at first there, we permitted the fluid to stay in the oleo until that plane was landed. After the plane was landed, then we drain the oleo and put it down so that there wouldn't be the cost, and so we had to be going up and down.

Q. You are familiar with this particular plane, Mr. Lehmkuhl?

(Showing picture to the witness.)

A. Looks to me like a jet without the engine on it.

(Testimony of Charles R. Lehmkuhl.)

Q. That is right. Libelant's exhibit 14. You see that strut [505] there, do you—I mean the tripod?

A. Yes, sir.

Q. How is that attached to the strut?

A. My recollection, there is a—the wheels are taken off and the axle is on the stake with the right angles to the oleo, and as I recall there is a saddle at the top and clearance to go over that to hold the plane.

Q. It might move up—if it doesn't come in on a three-point landing, might override the other, one clear over the other?

A. There is that possibility, but they would normally hang straight.

Q. But sometimes it doesn't, and you have to watch that, isn't that right?

A. It could be, yes, sir.

Q. And where you have wheels on and come down on this platform, if it isn't sitting just where you want it, it is a matter of pushing that into the position you want it with the tripod?

A. As you lower it down, you control the airplane by using tag lines, and it is barely floating above the platform or footing, and before anyone can go underneath to touch any part of the airplane.

Q. I think you will agree with me that in landing the plane with the structure, that is, the tripod, on one of the [506] platforms, you have to watch that more closely than landing a plane with wheels?

A. No, sir, not until that plane is down to the point of practically sitting in there, and men go underneath and control the tripod.

(Testimony of Charles R. Lehmkuhl.)

Q. From that point down to the platform it is more difficult—withdraw that. They have to use more care in landing with tripod than wheel?

A. I wouldn't say so, no.

Q. The fellow that has the process of lowering can hold the wheel on the place where it is landed, is that right?

A. If it is landed on a solid surface.

Q. If you jam that tripod down with the same force you can a wheel, you might knock the tripod off?

A. Not if it landed square.

Q. But sometimes they don't land square.

A. That could be true, but I stated that I did not allow any personnel under the plane until it was practically in a resting position with the oleo strut hanging down.

Q. How far would the tripod be off the platform at that time?

A. Half an inch to an inch.

Q. Where are you to see whether it is half an inch or an inch?

A. Up the forward or aft of the plane, or star-board side.

Q. And does the crane operator put that down with such [507] precision you can stand away and watch it go down and tell it is within half an inch of that platform?

A. The crane operator takes instructions from the rigger, who is on the spot and giving signals.

Q. Let's assume there is a barge alongside one of these ships with a mechano deck and they have to

(Testimony of Charles R. Lehmkuhl.)

take the plane completely over to the other side where the man operating the crane can't see it.

Mr. Harrison: I object to that. That is not within the evidence. The crane operator said he could see it.

Q. (By Mr. Kay): All right, let's say the crane operator can see it. Certainly couldn't see the crane operator way over there in order to see whether it comes within half an inch of that platform.

A. It isn't his duty to, sir.

Q. I didn't say it was. The whistle man——

A. The whistle man, or rigger, as I call him, is on the barge. He picks up the plane—there is a rigger in charge of every movement, and second man. The rigger is on the barge, oversees the installation and proper lifting sling and proper lifting hoist, picks it up, swings it over, if it is an offshore job, puts it over the tanker to the presumed landing spot, then gives the crane operator the signal. He will then follow instructions from the man up on the catwalk of the tanker, or probably on the mechano deck either fore or aft of the [508] platform, wherever he can be seen by the crane operator and observe the job that is going on himself.

Q. Let me ask you this: Have you ever yourself done any of this loading of planes, that is, actually engaged in the landing of the plane yourself?

A. Yes, sir, I have been in charge of the crane many times, and many times I took over from my rigger on the job and landed the plane myself.

(Testimony of Charles R. Lehmkuhl.)

Q. All right. Actually, when you are landing those planes—have you landed planes of this nature?

A. No, sir. At the time we were loading, jets were not in vogue then, but we loaded all types of navy craft—big two-engine jobs and the small fighters, and on some of the jobs for the army there were B-39's, P-47's, and larger types which designation I don't remember.

Q. Do you know how far it is from the bottom of this fuselage to the bottom end of the tripod? Have you any idea?

A. I would assume on a jet type aircraft, probably about 24 or 23 inches, maybe a little bit more, 30 inches. I have never measured it.

Q. Is this tripod on this particular plane equipped with shock absorbers?

A. The tripod is not but the oleo strut is to which that is secured.

Q. Is that above the tripod? [509] A. Yes.

Q. How was that attached to the tripod?

A. The tripod is attached to the axle of the plane.

Q. By what?

A. By, I assume, a saddle at the top of the tripod with a clamp on top of it.

Q. The man you call a rigger, how far would he be from the platform that is landed—that is, from the tripod and the platform where it is to be landed?

A. Is that the rigger giving instructions to the crane operator?

(Testimony of Charles R. Lehmkuhl.)

Q. Yes.

A. He would be, oh, I would say anywhere, eight to ten, twelve feet away, wherever he can be seen by the crane operator and observe the job himself.

Q. Sir, is it your testimony that a man standing off some twelve feet away can tell to within half an inch of this stand?

A. In some cases further than that, yes, sir.

Q. After it gets to that point, a man certainly gets up to the tripod to see it is landed exactly where it is supposed to be, is that right?

A. After it is to within practically the permanent setting place of the airplane, yes, sir.

Q. And he is right there on the platform, is that right?

A. When the tripod is centered on the platform and in its [510] approximate final resting place, the people go in and steady it by actually physically taking hold of the airplane.

The Court: At that time is he physically under the plane?

A. Yes.

Redirect Examination

Mr. Harrison: I have one more question.

Q. Before the landing gear gets over the landing platform, is there any necessity for the man to go under the plane?

A. No, sir. I wouldn't permit it.

Mr. Harrison: Thank you, that is all.

(Testimony of Charles R. Lehmkuhl.)

Recross-Examination

By Mr. Resner:

Q. Mr. Lehmkuhl, I want to ask you a couple of questions. The rigger is the man who gives the whistle signal to the man on the crane, is that correct? A. Whistle or visual signal.

Q. They give a signal either by hand or with a whistle?

A. That is right. If they are out of sight of the crane operator they give a whistle signal. If they are in sight of the crane operator they give a hand signal.

Q. As I understand it, is it customary to give signals by whistle when you are on the offshore side?

A. Some commercial crane companies do that, yes. We did not, because I had two people spotted who were the first man and the number 2 man in the gang, one man on the barge who was to lift the aircraft, the plane, over the ship, and to its [511] resting spot on the tanker deck, then the crane operator was given instructions to take his instructions from the man on deck.

Q. So you are using two signal men?

A. Yes, sir, upon occasion. Upon occasion the man on the barge will follow the plane right up on the deck to give signals.

Q. Let's see, who is your employer?

A. Naval Air Station, Alameda.

Q. Naval Air Station? A. Yes, sir.

Q. Are the armed services unified now? Load-

(Testimony of Charles R. Lehmkuhl.)

ing operations done by both the armed services as a unity, rather than by separate division?

A. I believe now they have what you call a military sea transport which takes care of it. I am not familiar with that.

Q. Are you still loading planes?

A. No, sir, I am not.

Q. How long since you have been?

A. Oh, I would say two and a half, three years.

Q. At that time the navy was doing its own loading and the army was doing its own loading and the air force was doing its own loading, is that about it?

A. Not entirely, sir. We did a good many jobs for the army air force—excuse me—during the year I was in charge of the loading direction at the navy air station. [512]

Mr. Resner: Will you read that answer back, please?

(Answer read by the reporter.)

Q. (By Mr. Resner): The navy would do the work of the air force, and similarly would do the work of the army?

A. I don't know. I have no knowledge of that.

Q. Take a look at these pictures, eight, nine, ten for the libelant. They are pictures of a rig, similar to these heavy lift rigs?

A. Somewhat, not to ours. I have done very little work upon this type of rig.

Q. You are familiar, though, with that type of rig?

A. Somewhat.

(Testimony of Charles R. Lehmkuhl.)

Q. Did the navy have any rigs like that?

A. No, sir.

Q. Are you aware of the fact that the army did have such rigs?

A. Oh, yes, I was aware of that fact, but I never worked on that particular rig.

Q. Never worked on that type of rig?

A. We had on occasion some crane service in the naval air station, Alameda, it was very inadequate. There was once when I was in charge of loading direction we had three American Railroad cranes on the dock. We had anything heavier, or any on the offshore side of the ship, we contracted with Smith or Haverside. [513]

Q. They had heavy rigs?

A. They had heavy rigs. I believe, it seems to me, my recollection, we had a big rig.

Q. This is a name plate on this particular rig: 134,400 pounds at 73 feet radius; 83,000 pounds at 88 feet radius; 33,600 pounds at 100 feet radius; U. S. Army Transport Corps. Are you familiar with the kind of rig having that particular weight and load in that type radiation?

A. It is standard barge crane with limited capacity, yes, sir.

Q. Yes, but when you had a lift job like that, you say you would go get an independent contractor, wouldn't you? [413-A]

Q. You can see in this cab here, that it is oh, maybe 30 to 45 feet above the deck of the barge,

(Testimony of Charles R. Lehmkuhl.)

Mr. Lehmkuhl, that is the cab for the crane operator? A. The operator's cab.

Q. The operator's cab, and that is on the off-shore, and down in this lower righthand corner that is the deck of the vessel? A. Yes, sir.

Q. And if a plane were being loaded across this deck and over onto the inshore side, of course, you are familiar with the fact that that is quite a distance to move a plane in a heavy rig operation of this kind? A. Yes, sir.

Q. And that would entail the giving of whistle signals from a man in an advantageous position on the ship to the man in the cab on the barge?

A. I wouldn't say it was necessary, probably might be convenient, but not necessarily, sir.

Q. Well, it would be usual and a proper practice?

A. In my practice over there I was very disinclined to depend upon whistle signals, I preferred the visual signal.

Q. If the Army had performed this type of operation with an Army civilian in the cab and an Army civilian as the whistle man or a rigger man on the deck giving whistle signals if the Army used that particular type of practice you would be [514] inclined to quarrel with it?

A. No, sir, be completely out of my jurisdiction. If I was in charge I would prefer they give visual signals.

Q. If the Army prefers the other practice would you say that was improper?

(Testimony of Charles R. Lehmkuhl.)

A. Not necessarily.

Q. Well, not necessarily; what do you mean?

A. I mean by that, sir, I think either way would be correct.

Q. All right. Now, let me read you something, Mr. Lehmkuhl. This is a statement of a man——

Mr. Harrison: What are you reading from, Mr. Resner?

Mr. Resner: From page 20 of the deposition of Charles Cates, the whistle-man.

Q. I am going to read something to you in connection with the happening of an accident where a plane dropped.

Mr. Harrison: Your Honor, this deposition is not in the record.

Mr. Resner: I am going to ask the witness a hypothetical question and his familiarity with loading operations, Mr. Harrison.

The Court: It is not confined to the record on that.

Mr. Harrison: I understand.

Mr. Resner: Thank you, your Honor.

Q. Now, Mr. Lehmkuhl, this man's being asked to tell us how the accident happened, and then he gives this answer: [515]

“Just prior to the time that this happened we had set the plane down on the pallets and it wasn't in the exact position the way they wanted it, so we picked it up, we had to swing it further aft in order to clear the stays. We had to boom a little closer inshore so we could swing it toward the bridge to

(Testimony of Charles R. Lehmkuhl.)

clear the stays. So I picked it up, and I gave four signals, that is, four whistles to boom down, and of course I'm watching the plane to see that it is clear all the time, and it came back suddenly and it hit, and just as it hit the block caught it and it seemed like it kind of caught, you know, like that, and several men had been working there all the time, they have to steady this plane as it goes around."

Now, in your experience and work, Mr. Lehmkuhl, are you familiar with that kind of a situation where you bring the plane, like this man did, to a particular place, it isn't the way you want it, and you pick it up and move it over, and the men grab hold of it, see that you get it into the proper position; it is a frequent occurrence landing planes on decks, isn't it?

A. It occurs, I wouldn't say frequent. I am speaking, if you will please, from my own experience, the way we load aircraft at my job, I mean.

Q. I understand, sir. [516] A. Okay.

Q. But by comparison to this situation that I have been reading you about, in your experience this is not an unusual thing to occur in the landing of a plane, you kind of maneuver it one way—

Mr. Harrison: Your Honor please, merely for the purposes of the record, Mr. Resner has used a very unique device to get into evidence—

The Court: He always does that.

Mr. Harrison: He is now framing a hypothetical question upon a matter which is not in the record, there is no evidence at all that it is properly in this

(Testimony of Charles R. Lehmkuhl.)

record that the plane was ever landed and picked up again, framing a hypothetical question on something which was ruled out by this Court.

Mr. Resner: I beg your pardon, Mr. Harrison, it was ruled out, his Honor merely told us that if the witness was available we should subpoena him, but I submitted both to you, counsel, and to his Honor that the gentleman whose experience I am referring to in this deposition is an employee of your client, the United States of America.

Mr. Harrison: He is just——

Mr. Resner: You apparently——Mr. Harrison, sir—you apparently have seen not fit to call him as your man. Now, if we want to get certain evidence here by asking another of your witnesses, this is perfectly proper. If [517] you want to refute it in any way, why, this man is right down here in the Army station, all you have to do is call him in if there is anything you think you want to explain, why, Mr. Cates is there.

Mr. Harrison: Your Honor please, I suggest——

The Court: Pardon me, so I may follow this. You were reading from what?

Mr. Resner: I was reading from the deposition of Mr. Cates.

The Court: Mr. Cates has not appeared?

Mr. Resner: He has not appeared, he is a government employee who was giving the signals, the whistle man.

Mr. Harrison: Your Honor, please, that is not——well, that is a matter of record, but, your Honor,

(Testimony of Charles R. Lehmkuhl.)

over my objections, ruled out the business of Mr. Cates. At that time I pointed out that the best way—that he was available to Mr. Resner and that his testimony in my opinion would be nothing but accumulative and did not go to any of the elements of this case. We already had the barge foreman.

The Court: I think I can appreciate this situation. Here we have an expert.

Mr. Resner: Certainly.

The Court: And we have developed his activity during a period of time. You might dispense with his deposition entirely and ask him what you are asking him now. [518]

Mr. Harrison: That is very true, but what he has done is take some of the deposition, some facts which are not of record into this case and frame it into a hypothetical question.

The Court: I don't want to do violence to the rules of evidence, but I would have no hesitancy, if this man was available, you had an opportunity to meet that, I would give him a record, but I think it can be raised another way so there will be no difficulty.

Mr. Resner: Thank you, Judge. I will just ask you, Mr. Lehmkuhl, and then I will subside—

Q. The thing that I have been presenting to you by question in the form of words of another man, in your experience is the kind of a maneuver which is not uncommon, in the handling of planes and loading them aboard a ship, isn't that true?

A. It has happened to the extent that we have

(Testimony of Charles R. Lehmkuhl.)

had to sit the aircraft down and pick it up again, or, that is, to set the aircraft, respot it, at least pick it up again, where we get a better lift on it.

The Court: Place it to your advantage?

The Witness: Yes.

Q. (By Mr. Resner): Yes.

The Court: I understand that.

Mr. Resner: Yes, Judge.

Q. And then the men that are going to handle the plane, they [519] have to help guide it to the appropriate place?

A. Yes. They set it down, and when they re-picked it up they barely float it, in the words, the parlance of the trade, just barely float it and move it so that the wheels or landing stands are off of the platform.

Mr. Resner: Thank you.

Redirect Examination

By Mr. Harrison:

Q. If they had to pick the plane up to the extent of two or three feet above the main deck, would it be proper for the men to go under?

A. They would handle it with tag lines.

Q. They would handle it with tag lines?

A. Yes.

Q. Mr. Lehmkuhl, you came here just because I called you up, you are not under subpoena, are you?

A. No, sir.

The Court: That is to avoid the fee.

(Testimony of Charles R. Lehmkuhl.)

Q. (By Mr. Harrison): Other than the five minutes that I talked to you before you came down here, have I discussed this case with you at all?

A. No, sir, I was called up by Mr. Schmitz, I believe, last Tuesday. I believe he said he was a safety man——

Q. Yes.

A. I don't recall. Later that afternoon I was out of my office, I came in about 3 o'clock and there was a note on my [520] desk to call Mr. Harrison, which I did. He asked me a few questions, asked me if I would come over and testify in the case as a government witness. I said I would provided it was cleared with the necessary authorities at the Naval Air Station.

Mr. Harrison: I merely wanted to point out, your Honor, that this was, of the experts that have appeared, here, is the only one who hasn't talked over his testimony with counsel.

The Court: I don't care, if you weren't acting in good faith I would sooner or later discover it. Until that happens, you can relax.

Mr. Harrison: Yes, your Honor. That is all.

The Court: Is that all from this witness?

Mr. Resner: I have no more questions.

Mr. Kay: That is all, your Honor.

The Court: Thank you for coming.

The Witness: May I go home now?

Mr. Harrison: You can go back to work.

The Court: So far as I am concerned, you can call it a day.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Harrison: Well, if your Honor please, I believe that is the Government's case.

Mr. Kay: We have some evidence then to present, your [521] Honor, and we would like to call Mr. Holbrook, please.

DAN PHILIP HOLBROOK

called as a witness on behalf of the respondent-impleaded, sworn.

The Court: What is your full name?

The Witness: Dan Philip Holbrook.

The Court: Spell your last name for the Reporter.

The Witness: Capital H-o-l-b-r-o-o-k.

The Court: Where do you reside?

The Witness: Richmond, California.

The Court: And your business or occupation?

The Witness: General superintendent of Jones Stevedoring Company.

The Court: Jones Stevedoring Company?

The Witness: Yes, sir.

Mr. Kay: That is our client, your Honor.

The Court: Yes.

Direct Examination

By Mr. Kay:

Q. Before you were general superintendent of Jones Stevedoring Company, will you just briefly

(Testimony of Dan Philip Holbrook.)

give his Honor your background and stevedoring experience?

A. Started on the waterfront as a longshoreman in 1928, went walking boss in the first part of the war, and during the war went to Jones Stevedoring Company as walking boss and also as assistant superintendent of stevedoring at the Alameda [522] Army Air base in Alameda. After the war I went—or after leaving Jones' employ in '48, I went to Alaska as manager of the Northern Stevedoring and Handling Corporation, and returned to the waterfront a little over a year ago, and worked as a walking boss up until the first of this month, when I became general superintendent of Jones Stevedoring Company.

The Court: When you came over there I thought you were a banker.

The Witness: No, sir.

Q. (By Mr. Kay): Mr. Holbrook, in the course of your experience have you had to do with loading planes on mechano decks? A. Yes, sir.

Q. That model you see over there, that is a fair representation of a forward port section of the mechano deck on one of these tankers, is that right?

A. A fair representation, lacking the obstructions underneath it.

Q. In other words, underneath the mechano deck there are quite a number of obstructions?

A. Yes.

Q. By the way, what would you say those are?

A. Pipes, valves, vents, hatches.

(Testimony of Dan Philip Holbrook.)

Q. And these vents, come up from the deck how far?
A. Around four feet. [523]

Q. Now, would you say about how much experience you have had with that type of loading?

A. Oh, I imagine that I have been on actually about a dozen loadings as a walking boss and probably a dozen that I have had supervision over them.

Q. And by the way, in all that experience have you ever known of a man ever becoming injured in that operation?

A. No, sir, we have never, I have never had any injury on one of them.

Q. Have you ever heard of one?

A. Not until this case here.

Q. Yes. Now, will you tell the Court whether or not on any one of those occasions planking was ever used on the mechano deck except for the platforms on which the struts or the landing gear of the planes was to be landed?

A. No, we never, never used any.

Q. And can you, in view of your experience, are you able to tell us why you don't, why planking isn't used?

A. Well, it is impracticable, for one reason, that the beams and stuff have to be movable as the planes are being loaded, and another thing is that if planking was put on the thing it would be a—it would be a hazard through loose ends and nothing but traps by the tender ends.

Q. What do you mean by the tender ends?

A. Tender ends protruding over a beam. [524]

(Testimony of Dan Philip Holbrook.)

Q. In other words, in the course of moving the beams it would inevitably follow that some might extend over beyond a beam, a man might step on that loose end and go down? A. Yes.

Q. Would that be likely to occur with respect to the movable beams on the thwartship beams in walking on those? A. Either one.

Q. You have seen the operation, I take it, of barges alongside of a tanker in which planes are loaded over onto the mechano deck?

A. That was the only type of an operation that we performed by heavy lift barge, either at the dock-side or at anchorage.

Q. Yes. And will you describe what that operation would be in taking over a plane from the barge to put it on the opposite side of the deck, that is, where you would go across the starboard side of the mechano deck and load it on the port side?

A. Well, the plane would be made fast on the barge, tag lines secured to it, and the plane picked up high as possible because they have to boom down with it to reach further across, and while it is being loaded it is guided by men with tag lines down to a position of approximate placing.

Q. Now, about how far would that be to this approximate place you speak of, where would the plane be with reference to the men working [525] with it?

A. It would be approximately a foot or so off the platform or the tripods where it is going to rest.

Q. You mean a foot from the tripods?

(Testimony of Dan Philip Holbrook.)

A. Yes.

Q. Now, is the position——

A. To allow for the working of the barge.

Q. Now in the operation of this barge, Mr. Holbrook, it is out in the stream, out in the Bay there, is that right?

A. That is correct.

Q. And will you state whether or not during that operation there is any movement of the water, and if so, from what cause?

A. Movement of the water from tide, wind, also the hazard of a large vessel or a small vessel going by.

Q. And that causes then a movement in the water, movement of the barge——

A. Movement of the plane.

Q. And of the plane. And when you get that in that position what is your job then?

A. Job then is to get the tripods in position to land on the platform.

Q. And how is that done?

A. By a man taking hold of them.

Q. And where would the man stand?

A. He will have to stand in the position that, where he can [526-7] place his hands on the tripod.

Q. Is that done, Mr. Holbrook, while this load is coming over, while the plane is coming over and while it is in the process of flight?

A. No.

Q. When is it done?

A. It is done after that plane comes to a stop.

Q. And then is it customary and usual practice for stevedores at that point then to hold onto that

(Testimony of Dan Philip Holbrook.)

strut to help to guide it down? A. Yes.

Q. And in the guiding of that down to that position on the platform is it necessary also, or does that involve or include the steadying of the—

A. Yes.

Q. —plane?

A. Because you have a plane—most all planes are suspended on three points, rest on three points. Your deck of your plane—of your ship, is not perfectly level fore and aft or athwartship, it has a crown on it, and the plane is supposedly slung on a level, and therefore one point on the plane will touch before the second or third point does, and until all three points have a firm bearing these stands have to be shifted and kept in a vertical position.

Q. I take it these stands are put on as a makeshift affair, [528] not a part of the plane, of course, the tripod? A. Yes.

Q. Now, is it easier to land one with the tripod on, or is it easier to land one with the wheel on, or are they both the same?

A. It is easier to land the one with the wheels.

Q. And why is that?

A. Because all there has to be is a chalk or a block in an approximate position to keep the plane or wheel from rolling off the platform.

Q. Now, where you have a tripod then will you state whether or not it is necessary for that man guiding it down into a final place from its position about a foot off the platform, is the man that is there at that strut to be right under that plane?

(Testimony of Dan Philip Holbrook.)

A. Yes, it is.

Q. Is there any other way he can do that job?

A. No, none that I know of, because if that isn't perfectly level the plane will kick.

Mr. Kay: I think that is all.

Cross-Examination

By Mr. Harrison:

Q. Well, with reference to that particular type—to that testimony, Mr. Holbrook, until the landing gear comes over the platform itself is it necessary for a man to get over there and hold onto the landing gear?

A. Will you rephrase that again? [529]

Q. Yes. Until the landing gear which we are going to land on this platform arrives over the platform itself is there any necessity for a man to hold onto the landing gear?

A. No, can't before it gets over, is—it is practically impossible for them to get ahold of it.

Q. In other words, to hold onto the landing gear I would have to reach underneath a wheel of the plane? A. Most cases, yes.

Q. Yes. That is before the arriving at the platform? A. No, not before the arriving.

Q. Is there ever any necessity for holding onto it before it arrives at the platform?

A. No, because you have to hold with the tag lines until it reaches——

Q. Would you say then——

(Testimony of Dan Philip Holbrook.)

Mr. Kay: Mr. Harrison, I didn't get the last part, what did he say, Mr. Reporter?

(Record read by the Reporter.)

Mr. Kay: He started to say something, it is lost now.

Q. (By Mr. Harrison): That is, you hold on until the tag lines—until it arrives over the platforms? A. Yes.

Q. Would you say if a man took it upon himself, or instructed to grab ahold of the landing gear underneath the plane before it arrived on the platform, was that an unnecessary operation? [530]

A. Well, there would be a very short time that he could get ahold of it before it came to a stop.

Q. I see. But if he grabbed ahold of it before it arrived over the platform he would be performing an unnecessary operation?

Mr. Kay: Just a moment; I think that needs to be clarified. "Over the platform" is a relative term. We understand in this case that they don't spot exactly over, there is some adjustment to be made, and I think that should be made clear.

Q. (By Mr. Harrison): Let us assume—I will lay a little more foundation here.

Mr. Holbrook, if, as in this case, a plane dropped and it went all the way down so that the wings of the mechano deck—I mean, the wings themselves struck the mechano deck—— A. Yes.

Q. ——would you assume from your experience

(Testimony of Dan Philip Holbrook.)

that it had not been spotted over the platforms at that time?

A. Not necessarily, because it might have hit the platforms, in most cases they are very small, might have hit the platform and glanced off of it, which it could do very easily.

Q. Let us say we know as a fact it did not hit the platform, would you say, safely assume it was not over the platform when it dropped?

Mr. Kay: I don't follow that, I think that unintelligible; object on that ground. [531]

Q. (By Mr. Harrison): You understand the question?

A. I think I understand what you mean. You're asking if the plane was dropped and didn't hit the platform.

Q. Then it would be safe to assume that it was not over the platform when it dropped?

A. The strut was not over.

Q. The strut was not over the plane. Now none of the struts were over any of the three platforms; is that right?

Mr. Kay: What is this about?

The Witness: I don't understand.

Mr. Kay: I don't understand what you are getting at.

The Court: To be frank with you, I can't follow it, either.

Mr. Harrison: Your Honor, please, it is our position in this case that—as I have stated it so often—that this man, Mr. Luehr, was not under-

(Testimony of Dan Philip Holbrook.)

neath this plane for the purpose of attaching any tripod or bringing the tripod down to the platform, because the facts are that the airplane's landing gear had not come within the vicinity of that platform at that time. That can be shown by the fact that when it dropped the landing gear of the plane didn't even hit the platforms, it went down in between the mechano deck.

I am asking this witness if when one of these—if when a plane dropped and the wings struck, would it not be safe to assume that it had not been spotted over the platforms. [532]

Mr. Resner: The difficulty with reference to Mr. Harrison's question is testimony based upon conjecture, and upon which I object. We are concerned here with the facts as they are existing, not counsel's conjecture, or what might be.

Mr. Harrison: I have stated the evidence very fairly. The fact is that the wings of the plane did come all the way down and strike the mechano deck and that the landing gear missed the platform. Those are facts, known facts. They are—do you controvert those facts at all, Mr.—

Mr. Resner: Mr. Harrison, I think you are trying awfully hard to make the best of a tough situation.

Mr. Harrison: Again, do you controvert the facts the wings of the plane struck the mechano deck?

Mr. Resner: I don't know that I am a witness; I don't know, if you are inviting a stipulation. I

(Testimony of Dan Philip Holbrook.)

am an advocate presenting the facts here and I am going to let Judge Roche decide it.

The Court: I will try to do my best.

Mr. Resner: I know you will, sir.

Mr. Harrison: Well, I think the fact is so plain to all I need not go into it any further with this particular witness.

Q. I will ask you once again for the purpose of the record: Until the landing gear comes over the platform is it necessary for a man to grab hold of the landing gear?

Mr. Kay: Just a moment. Your Honor, there again, at [533] what stage? Where it is 12 feet up there or approximately over there or what? That is what I don't understand. I am sure the witness——

Mr. Harrison: I don't care where it is, until it gets over the platform is it necessary to hold onto the——

Mr. Kay: That is relative——

The Court: Let me give you my state of mind. I am trying to follow all of this, have some difficulty at times the testimony here. What witness, I do not recall, testified this plane came down, they approached it, and they attempted to follow it down to spot it. Is that a fact?

Mr. Harrison: No, your Honor, that is not the situation.

The Court: Somebody correct me.

Mr. Harrison: May I suggest to you that in the situation here the plane came down, then the testi-

(Testimony of Dan Philip Holbrook.)

mony is that it was—since it was not over the platforms it had to be moved.

The Court: Yes.

Mr. Harrison: And that the crane operator was going to boom down, wasn't lowering the plane at all, it wouldn't lower the plane to boom it down.

The Court: I am talking about the testimony before it fell.

Mr. Harrison: This is before it fell, yes, your Honor.

The Court: Did they approach and touch the plane? Any witness here? [534]

Mr. Harrison: Yes, they did, your Honor.

The Court: That is what I am thinking about.

Mr. Harrison: Yes, they did, that is what the Government contends, that Mr. Luehr himself placed himself in an entirely unnecessary position under the airplane, the job which he was to perform was to steady from swinging.

The Court: I don't think you can limit the matter to approaching the plane and tell him what he may or may not do.

Mr. Harrison: My argument is this: That the landing gear hadn't come over the platform, he couldn't have been down there, he testified he didn't have bolts, the tripod, or anything; he could not have been up there for the purpose of attaching that landing gear.

The Court: I don't know what purpose, but he was there; that is all I am contending at this time.

Mr. Harrison: He was there.

(Testimony of Dan Philip Holbrook.)

The Court: But to say, to go further, all right. What do you conclude from this testimony, what is the quarrel?

Mr. Harrison: That he was in the particular position unnecessarily and improperly; there was no necessity being under this cargo.

The Court: This is very unusual, up to this time I wouldn't prove that he was. I say that advisedly, and I will give you plenty of time to change my view on it. I say that kindly, so let us proceed. You get the best record you can. [535]

Mr. Harrison: All right, I will ask the question once again.

Q. Until the landing gear of the plane arrives—to please Mr. Kay, I will say within the square footage of the platform, that is, within that area directly above the platform—is it necessary for a man to go underneath that airplane and hold on to that landing gear until that time?

A. No, not until——

Q. It is not?

A. Not until it is over the platform, no.

Mr. Harrison: Your Honor, that's our contention, it was not over the platform.

The Court: All right.

Mr. Harrison: He was there unnecessarily.

Q. One more thing. You testified that it is not the general practice of the Jones Stevedoring Company to provide any walking boards or planking for these men; is that true?

Mr. Kay: He didn't say that; he said there were

(Testimony of Dan Philip Holbrook.)

never any walking boards or planking on mechano decks; wasn't a question of providing them.

Mr. Harrison: All right. Who else is going to provide them?

Mr. Kay: That is beside the point; that was his testimony.

Q. (By Mr. Harrison): Is it true that the Jones Stevedoring [536] Company never used walking boards or planks on this type of an operation?

A. I don't just understand the question. I was asked before whether I used them. Now it is whether Jones furnished them.

Q. That is right—oh, I see, you yourself have never used them; I understand. A. Yes.

Q. Would you say then that it would be possible to use them? A. No.

Q. It is impossible to use them?

A. Yes; impractical, too.

Q. Is it impossible?

A. Yes, practically impossible from the safety factor.

Q. Well, Mr. Holbrook, there has been testimony in this case from men who have used them. Now—have seen them used. You think they are lying?

A. No.

Mr. Kay: Your Honor—

Mr. Resner: Your Honor, please, I would like to say—

Mr. Kay: —that is improper cross-examination.

(Testimony of Dan Philip Holbrook.)

The Witness: I have never seen them used. I have never used them.

Q. (By Mr. Harrison): You think it is impossible?

Mr. Kay: Asked and answered, your Honor; objected to.

The Court: He said it was impossible from the safety [537] standpoint.

Q. (By Mr. Harrison): Is it possible for the operation to be performed with walking boards, then? A. No, I don't think it is.

Mr. Harrison: I believe that is all.

Mr. Kay: Just a couple of questions, your Honor.

Mr. Magana: Does the Court want to take the recess now?

The Court: Is that a polite way of asking for a recess?

Mr. Magana: No, your Honor.

The Court: We will take the recess.

(Short recess.) [538]

Cross-Examination

By Mr. Magana:

Q. Mr. Holbrook, I just have a very few questions. Maybe you can straighten this out for us. As I understand it, the man in the cab operating the crane operates it exclusively on signals; is that correct?

A. In our case it is all on whistle signals, sir, and has been.

(Testimony of Dan Philip Holbrook.)

Q. Whatever it is, it is on a signal of the party watching the operation at an appropriate place?

Mr. Harrison: I object to this line of testimony. This man wasn't there. He doesn't know whether it was whistle signal, hand signal, or anything else. He is incompetent to testify on this point.

Mr. Magana: I don't care whether it is hand signal or whistle signal. I will reframe it, your Honor. I can get at it another way.

Q. (By Mr. Magana): The man in the cab does receive a signal to operate the crane; is that correct? A. Correct.

Q. All right. The man who gives the signal, as I understand it, is called the whistle man; is that right? A. Yes.

Q. In this operation, whenever you are using a barge—in this case I understand it was an off-shore barge—can you tell us whether or not the barge, when it is offshore, has a tendency to move to one side or the other? [539]

A. Yes, it is more or less movable.

Q. And with reference to the boat itself, if it is inshore, does that have a tendency to move depending upon the tide, the wind, and other factors?

A. Yes.

Q. Then in stopping the descent of the plane, who is it who stops the descent of the plane?

A. The signal or whistle man.

Q. Is there any fixed level at which that plane is stopped, or does that depend upon the whistle man?

(Testimony of Dan Philip Holbrook.)

A. Depends upon him and his judgment.

Q. Then once the plane is stopped so that it is no longer descending, if it is within reach, at that time can you tell us whether the stevedores customarily hold on to it to guide it to the platform?

A. Right, yes.

Mr. Magana: That is all.

Mr. Harrison: Well, I will get you to straighten out this again. Counsel has successfully dodged the issue.

Recross-Examination

By Mr. Harrison:

Q. To do that, do they hold on to it before it reaches the area of the platform?

Mr. Kay: You see, I objected to that three times. We have asked this man something definite, then they question if it is way overhead— [540]

Mr. Harrison: All right—

The Court: I stated my state of mind at the very beginning of this trial. As I recall it, this plane was lowered between three, five, and six feet.

Mr. Harrison: That is right, your Honor.

The Court: And that was the position that he, the plaintiff here, approached it for the purpose of guiding it.

Mr. Harrison: That is right, your Honor.

The Court: Proceed.

Mr. Harrison: But we must further state, your Honor, that he wasn't guiding it down to the platform because it hadn't arrived over the platform.

(Testimony of Dan Philip Holbrook.)

He was there to either guide it to or from the platform, not down to it.

The Court: How can you limit it to that?

Mr. Harrison: Because the reason—we know it didn't arrive over the platform. Do you follow me on that, your Honor?

The Court: Yes.

Mr. Harrison: It is quite evident it had not arrived over the platform. The only guiding necessary at that time to get it over the platform is to stop it from swinging itself and to guide it a little bit as it approaches the platform. That has been the testimony of——

The Court: There was testimony, too, about two hands being on this.

Mr. Harrison: This particular witness did that, yes, your [541] Honor. However, there is testimony that to steady the plane as it approached the platform, it could be done by your hands on the wings or even under the wings on the skin of it.

The Court: It would depend on the conditions existing at that time.

Mr. Harrison: That is right. There has been testimony of this very witness, whose boss is the Jones Stevedoring Company, as I understand it, that it is unnecessary to go underneath the plane and hold on to the strut until it comes directly over the platform. That is his testimony. Mr. Magana has successfully made it look some other way by some skillful phrasing, but I want to ask that question again.

(Testimony of Dan Philip Holbrook.)

The Court: Very well.

Mr. Kay: I want to get this record straight, too, because I know Mr. Harrison has that theory, and he is entitled to it.

The Court: That is the theory of his case; I understand that.

Mr. Kay: But this is the testimony, your Honor—your Honor has it in mind, and it is at the very beginning of this case—Mr. Spirz's testimony. He was asked:

“Q. Now, did you see Mr. Luehr right before this accident?”

“A. Well, yes, when I was standing here (indicating).

“Q. You said here, on the catwalk, you have indicated [542] the catwalk?”

“A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Luehr standing over here by the stays, and we waited for the plane to come down, and when the plane stopped and we were ready to take over and hold on to it, I saw Mr. Luehr coming over and grab hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.

“Q. Was he in a place where he was supposed to be, Mr. Spirz? A. Yes.

“Q. That was his job there?”

“A. That is his job to hold on to the plane and steady it.

“Q. Was he doing what he was required to do at that particular time?”

(Testimony of Dan Philip Holbrook.)

“A. That is correct.”

Mr. Luehr said this, and I read this to the Court before, and I will tie it in with Mr. Harrison’s cross-examination immediately thereafter:

“Q. (By Mr. Kay): Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your left hand and a hold of the [543] fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck; is that correct? A. That is correct.”

Then Mr. Harrison later asked him this one question and got this answer, and he picked that one answer out of context and says that was all he was going to do. Mr. Harrison—I have it here, and it is important, so I think it is worth taking a minute here.

The Court: Mr. Harrison will guide you.

Mr. Kay: He certainly ought to know where that is.

Mr. Harrison: It is in here so many times——

Mr. Kay: I think I have it here. Well, I can’t find it, your Honor, but Mr. Harrison stated this, and I remember it very particularly. He asked this witness, “Your purpose in going over there was to steady this plane?” and the man said “Yes.” Obviously, that is part of this whole operation.

Mr. Harrison: I also asked further, “Did you have a platform with you?” “No.” “Did you have

(Testimony of Dan Philip Holbrook.)

the bolts with you?" A. "No." "Did you have a tripod with you?" A. "No." In other words, the only purpose he had there was to steady the plane. He couldn't have done any work on the platform; he didn't have the bolts, he didn't have the platform, he didn't have the tripod, anything. [544]

Mr. Resner: The trouble with this argument is that they are omitting the ultimate fact. The efficient, proximate cause was the fact that the man released the lever and dropped the plane.

Mr. Harrison: Mr. Resner, if you are going to argue efficient, proximate cause at this time——

Mr. Resner: That is what it is about.

Mr. Harrison: This is not the time.

Mr. Resner: I understand. Why are you trying to make the Court overlook the basic factor in the case?

Mr. Harrison: Just answering Mr. Resner for one second, if I can avoid some rebuttal from him, there can be many causes of an accident. I think Mr. Schmitz gave us a pretty good analysis when he said the cause of the accident was the dropping of the airplane, and the cause of the injury was the man being under the airplane.

Mr. Resner: That is a non sequitor. If he had known it was going to happen, Mr. Harrison, he wouldn't have gone to work that day; but unfortunately none of us knows our destiny.

Mr. Harrison: Nevertheless, I think that is pretty irrelevant.

Mr. Kay: So that we finally conclude this phase

(Testimony of Dan Philip Holbrook.)

of it, I found this section. Rather, Mr. Magana was looking for it and found it. This is page 246. Mr. Harrison says:

“Q. I interpret your testimony to be, you were up [545] there to steady the airplane?

“A. That is right.

“Q. Did you have the platform with you that was going to go underneath the wheels?

“A. The platform already was underneath there.

“Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform? A. No, sir.

“Q. Were you going to fasten it?

“A. No, sir.”

Obviously, at that time he wasn't, but that would be a later operation.

Mr. Harrison: Obviously at that time he wasn't, and that is exactly the point. It is also obvious from the fact that the plane fell all the way to the mechano deck it was spotted over the platform at that time, regardless what Mr. Spirz might like us to believe.

The Court: I will give you gentlemen sufficient time to argue this case after we marshal the facts. Proceed.

Mr. Harrison: I was going to straighten out with Mr. Holbrook once again—well, I will get at it this way:

Q. How low do they lower the plane, and how near does that landing gear come to the platform before the men generally go over there to fasten it?

(Testimony of Dan Philip Holbrook.)

Mr. Kay: That is a compound question. [546]

Mr. Harrison: All right.

Q. How low do they bring the landing gear down with relation to the platform before the men take hold of the landing gear to fasten it?

A. That, as I pointed out before, depends on the whistle man's judgment due to weather and conditions. Sometimes, a perfectly calm day, he might stop the plane, take it sometimes down that far (indicating).

Q. You are indicating around three inches?

A. Or say the vessel is laying in a sheltered harbor or cover, or there isn't much movement by, or he is in the stream where it sometimes becomes so rough you actually have to knock off work, he might have the plane over there four feet.

Q. Four feet?

A. Yes. Whatever the work would necessitate.

Q. Would you say the Oakland Estuary is a fairly calm body of water?

A. All depends on whereabouts in the Oakland Estuary.

Q. Do you know where Navy In-Transit Dock No. 3 is? A. Yes.

Q. Would you say that is a comparatively sheltered spot?

A. Well, depends on wind and movement of the navy tow boats over there.

Q. I don't know anything about navy tow boats and there doesn't seem to be any evidence in this case there was any such [547] thing. Would you

(Testimony of Dan Philip Holbrook.)

say the common practice in the estuary was to bring the plane down—how close would you say the common practice in the estuary is?

Mr. Kay: I don't think he can testify to that. He just stated it depends on what conditions might be, might be three inches, might be three feet.

Mr. Harrison: He did not limit it to the estuary at that time.

Mr. Kay: Then it is a matter for the whistle man's judgment. He testified to that.

Q. (By Mr. Harrison): Is it true you can't estimate what the general practice in the estuary is?

A. The estuary is quite a large body of water.

Q. I am talking about Naval In-Transit Dock No. 3, which I understand is a very sheltered spot.

A. It isn't in the estuary.

Q. It is even more sheltered.

Mr. Kay: This is getting pretty argumentative, your Honor.

Q. (By Mr. Harrison): I will ask, then——

A. It is a cove, sir.

Q. It is a cove off the estuary, isn't it?

A. Yes.

Q. And it is a very calm spot, isn't it?

A. Not always. I have seen southerly winds, it gets pretty rough there. [548]

Q. If the wind were blowing too hard, would it be the common practice of Jones Stevedoring Company to load airplanes under those conditions?

A. Well, that is another thing that is hard to say. There are a number of factors.

(Testimony of Dan Philip Holbrook.)

The Court: It would depend entirely on the degree of the storm.

A. Storm or the government, whatever they have to pay in the——

Mr. Harrison: Well, we have successfully avoided once again answering the question.

Q. (By Mr. Harrison): And that is, is it necessary for anyone to go underneath the plane and hold on to the strut before the strut arrives over the immediate area of the platform?

A. Oh, the immediate?

Q. Over the area immediately above the platform. In other words, assuming this is the platform (indicating). Say the strut is out this way, what do you hold on to?

A. When the plane comes down——

Q. I think the question is quite simple.

Mr. Kay: It is such a complex question, I think he is entitled to answer.

A. When the plane comes to a stop, supposing it is in a position to be able to reach the strut, might not be right over to an inch over the stand, but the plane has—they have to take hold of it then and get hold of the strut and have that strut [549] ready to place in position when it is——

Q. (By Mr. Harrison): When it is over the platform? A. When it comes to rest.

Q. Over the platform, that is right, and before it arrives over the platform is it necessary to grab hold of the strut?

Mr. Kay: Your Honor——

(Testimony of Dan Philip Holbrook.)

Mr. Harrison: What is the matter with that?

Mr. Kay: I will object to that as being unintelligible. He said in order to get it down on the strut they have to hold it. He says before it arrives. Arrives where?

The Court: I am glad you and Mr. Harrison are getting along so well.

Mr. Harrison: It is obvious the objection is facetious.

The Court: I will allow the witness to answer so we can get through here.

A. The strut or tripod is about 18 inches—16 to 18 inches in length, and as a rule its platform is made up of two two by twelves lying alongside of one another.

Q. (By Mr. Harrison): OK. Then it is 24 inches wide.

A. That is right. It is practically impossible to put that plane down to a stop and say that that tripod is right over that platform.

Q. Well, is it normal to stop a plane before they spot it over the platform, though? Isn't it at all times necessary—

A. (Interposing): It is necessary to—it has to stop before [550] it hits the deck—mechano deck.

Q. That is right. When they are bringing it over on the long arm and swinging around in position to lower it, it is within a very few feet of the deck and stopped? A. Yes.

Q. Assuming at the time it is stopped the wheels are nowhere in the vicinity of the platform,

(Testimony of Dan Philip Holbrook.)

is it then proper to go underneath the plane and hold on to the landing gear—necessary?

A. In my case I have never seen them go underneath when it isn't in approximate position of the landing place.

Q. In other words, if a man did go underneath it before it was in the approximate position of the landing place, you would be doing an unnecessary thing?

Mr. Resner: I am going to object——

A. No gang——

Mr. Resner: Just a moment. I would like to object. It is argumentative.

Mr. Kay: I think he is through now, anyway.

The Court: I will give you sufficient time to argue this case.

Mr. Harrison: I think Mr. Holbrook has argued it very effectively for me.

Mr. Resner: No further questions.

The Court: Step down.

(Witness excused.) [551]

Mr. Kay: Mr. Moore.

WALTER MOORE

called as a witness for respondent impleaded Jones Stevedoring Company; sworn.

The Court: Your full name?

A. Walter Moore.

The Court: Where do you live?

A. San Francisco.

(Testimony of Walter Moore.)

The Court: And your business or occupation?

A. Longshoreman.

The Court: How long have you been so engaged?

A. 25 years.

The Court: On the waterfront here?

A. Yes. Pacific Maritime Association.

The Court: You are employed at the present time by whom?

A. Pacific Maritime Association.

The Court: All right.

Mr. Kay: Your Honor, I promise I will get through with this witness a little faster than the other, and I hope other counsel will, too. I am sure they will.

The Court: Then let's admonish Mr. Harrison and other counsel.

Direct Examination

By Mr. Kay:

Q. Have you had occasion to work on [552] mechano decks such as you see over there in that model, in connection with the loading of planes?

A. Yes.

Q. Would you tell us about whether you had many ships to load of this type?

A. Yes, I have loaded several. Quite a few of them.

Q. In about what period was that?

A. That was during the war.

Q. For whom did you work on those jobs?

A. For the Army.

(Testimony of Walter Moore.)

Q. Directly for the Army?

A. Yes, the Army.

Q. Not through a stevedoring contractor?

A. No, for the Army.

Q. Can you tell us how the Army does that work?

Mr. Harrison: I object on the ground it is incompetent, irrelevant and immaterial, and there is no proper foundation laid.

Mr. Kay: All right, I will lay the foundation. We are trying to go along here.

Q. Let me show you an exhibit that has a plane, libelant's Exhibit 14. A. Yes.

Q. There is a strut on there with a tripod. Are you familiar with that? [553] A. Yes.

Q. In that operation that you have done on those several ships with mechano deck structures, have you actually worked in putting planes aboard with struts or with tripods?

A. Yes, with the tripods and with the — those just with wheels on them.

Q. In some cases they may have the wheels on, and other cases they have a tripod? A. Yes.

Q. Will you state whether or not—well, you see that picture there? You have a platform there?

A. Yes.

Q. That is the kind of thing you put the plane down on; is that right? A. Yes.

Q. Can you describe how that plane is put aboard and finally landed? Use your own words on that.

(Testimony of Walter Moore.)

A. Well, they bring it over—usually we use a barge and bring it over on the barge, and when it gets about four or five—four feet or three feet down right over this platform here, the foreman blows a whistle and they stop. Our practice, we was up on top around there, then we would go get hold of it, see?

Q. Get hold of what?

A. Get hold of those struts. [554]

Q. What did you do then?

A. Then he would lower it down. But on these tripods, they had those two by twelves, one on each side where the gear was. When that come down, these tripods, they swing and they don't land three. You have to hold it to get it between the square and see it is landed flat.

Q. Would you use your hands then?

A. Yes, use your hands.

Q. To help get it down?

A. Yes, to help get it down. We use one man on each side and we pull that straight. When she rides, you see, one corner kicks and you pull it so she lands flat.

Q. In getting them all the way down to the platform, is it necessary to help guide it down?

A. Oh, yes; you have to guide it, yes.

Q. When that first comes over and is held in the spill position, they still have to maneuver to get it in the exact spot they want it? A. Yes.

Q. Have you ever used planking on the mechano deck in doing that operation?

(Testimony of Walter Moore.)

A. Never seen it done.

Q. Have you ever done it?

A. No, I never done it.

Q. Was this the Army, directly working for the Army? [555]

A. Yes, I worked directly for the Army.

Mr. Kay: That is all.

Cross-Examination

By Mr. Harrison:

Q. Mr. Moore, is it necessary to grab hold of this strut before the landing gear of the plane arrives at a spot directly over the platform?

A. Well, all the planes I have worked on, when these fellows brought it over to us, always directly over before we got hold of it.

Q. You didn't ever grab one, then, before it arrived over the platform; is that right?

A. No, sir; come—it might be two or three feet—the strut be two or three feet away from the two by twelves, then we would grab hold and hang on to it and push it over a little bit. Just hold on to it, that is all.

The Court: Usually I should keep still, but what he said there, I didn't know they could spot them in the fashion he just indicated, right over the tripods.

Mr. Harrison: If your Honor please, the tripods are suspended from the landing gear. They just sit on the platform.

(Testimony of Walter Moore.)

The Court: I understand.

Mr. Harrison: The testimony about that, I believe, was that they lower the tripod within inches to the platform, directly over it, before they allow the men over there.

The Court: Very well. [556]

Mr. Harrison: And the witness himself testified he has never——

The Court: I am not inviting discussion.

Mr. Harrison: Yes, your Honor.

Q. (By Mr. Harrison): Mr. Moore, have you ever had occasion to be upon the mechano deck when the plane came over and started to swing?

A. I was always up on the mechano deck when it came over.

Q. Did you have to steady these planes when they started to swing?

A. Yes, we always have to steady them.

Q. Did you steady them by holding on to the tag lines, for instance?

A. Usually they are up high, they use tag lines, all depends on the fellow that is bringing the airplane in. He is the man. Sometimes they stop three or four feet above the platforms. Sometimes some of them come a little bit lower, but in no circumstances would a fellow grab it, no matter where he stopped it—it is up to that fellow. He is the fellow does it.

Q. You are talking about spotting the plane. I am talking about after the plane is stopped, and around directly over the platform and started to

(Testimony of Walter Moore.)

swing, have you ever had occasion to steady one at that time? A. Yes. [557]

Mr. Kay: That is assuming something not in evidence.

The Court: The answer is "Yes."

Mr. Kay: I beg your pardon?

The Court: The answer is "Yes." That doesn't militate against you.

Mr. Kay: Not at all. I guess I jumped the gun, your Honor.

Q. (By Mr. Harrison): In steadying the plane have you sometimes put your hand on the wing to steady it? A. Wings, any place you can.

Q. Or the body of the plane?

A. Yes, body, underneath the—what are those things again?

Q. Landing gear?

A. Where the wheels are at. I forget the name. I forget what you call those things again.

Q. Mr. Moore, are you familiar with the Pacific Coast Marine Safety Code? A. Absolutely.

Q. Are you familiar with this passage:

"When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load."

Are you familiar with that? [558]

A. Yes, that is correct. But when a load comes down, as soon as that load gets under way and stops, you grab hold. Nobody stands below. [558-A]

(Testimony of Walter Moore.)

Q. Don't stand underneath the load?

A. No.

Q. You think it would be proper to stand underneath the airplane?

A. That is a different thing altogether. I have loaded airplanes on these, and I have loaded them on these airplane carriers, when an airplane on an airplane carrier, those ships, you have to get underneath that plane as soon as it comes down, and on some of these planes, there is only about six inches when it comes down, no ropes, ropes do no good, because you can't pull, you go inside and get hold of the strut and hold the plane, you are underneath the plane.

Q. You are underneath the plane. Isn't it true that a strut itself would stop the plane from stopping only if it fell; it would fall on its landing gear?

Mr. Kay: You might have a 16-ton plane, smash through. That is calling for his conclusion.

Mr. Harrison: I am quite sure your Honor will take judicial notice of the fact that a plane is quite capable of landing on its own landing gear.

The Court: Will you read that rule, the slings?—read that.

Mr. Harrison: "When assisting to steady in hoisting or landing a sling load"—

The Court: Is this a sling load? [559]

Mr. Harrison: The plane was slung on a sling.

Mr. Resner: It is not a sling load; a sling load is a pallet board that has cases with sacks on it.

The Court: Yes.

(Testimony of Walter Moore.)

Mr. Harrison: How would you define the way this plane was slung?

Mr. Resner: This was an airplane, Mr. Harrison.

Mr. Harrison: Define how it was slung.

Mr. Resner: It was suspended on the fall, suspended from the boom operated by a crane driver employed by you, directed by a whistleman employed by you, who carelessly did the work and dropped the plane, period.

Mr. Harrison: Your Honor, please——

The Court: I never saw this witness before, he is a longshoreman; is this a sling load, this airplane?

The Witness: Well, I wouldn't know what you call it; I guess anything they call hanging a hook a sling load.

The Court: That is the answer for you.

Mr. Harrison: Thank you, your Honor.

The Court: Take the witness.

Mr. Harrison: I have a couple more questions.

The Court: All right. From time to time I have been down at the waterfront, and I believe, as counsel says, that a sling has sacks, whatnot on it, and what are those things?

Mr. Resner: Boards, pallet boards. [560]

The Court: Pallet boards, yes. I have seen so much of that maybe I have been led astray.

Mr. Harrison: They referred during the course of the trial, referred to the men that hook the plane on at the barge as slingers, and I think that they

(Testimony of Walter Moore.)

(Question read by the Reporter.)

The Court: Can you answer that?

The Witness: Well, I guess——

Q. You guess?

The Witness: Well, that—it is meant that there shall be no holes so you would fall through.

Q. (By Mr. Harrison): Then the reason that this rule is here is to avoid having open spaces that will—that men can fall through; is that your testimony?

Now, doesn't a mechano deck provide a lot of open spaces? A. Nothing but open spaces.

Q. Nothing but open spaces. Mr. Moore, do you know how wide a strongback is?

A. How wide?

Q. Yes, generally speaking; I know they come in various widths.

A. They come in various, different sizes, I would say, about six inches, the average.

Q. About six inches?

A. You mean the width of it? [563]

Q. The width of it, yes.

A. About six inches.

Q. I read to you this rule, Mr. Moore——

Mr. Kay: What is it?

Mr. Harrison: 820.

Q. "Employees shall never ride strongbacks or beams; nor shall they unnecessarily walk on or climb upon those in place."

(Testimony of Walter Moore.)

Is one of these beams any wider than a strong-back?

A. Well, I think some of those beams I looked at they were wider than a strongback.

Q. How much wider?

A. At least they are flat. Well, I should say about—it has been quite a while since I have been on them, but I know I have worked on them.

Q. The beams in this particular instance are ten inches or——

A. I say about ten inches, eight or ten.

Q. And the strongback?

A. About six inches.

Q. Do you know how wide the fore and aft beams are on these mechano decks? A. How wide?

Q. Yes.

A. I don't remember exactly, it has been quite a while. [564]

Q. Six inches, is it; all right.

A. Well, I wouldn't say for sure; it was all about the same, I think.

Q. You think they are all about the same?

A. Well, it has been quite a while since I have worked on one of these ships.

Q. How many of those ships have you worked on?

A. I have at least worked on half a dozen or more.

Q. At least a half a dozen?

A. Every time I have worked they were in there.

Mr. Harrison: I believe that is all I have.

(Testimony of Walter Moore.)

Mr. Kay: Just a couple of questions.

The Court: What is that?

Mr. Kay: Just a couple of questions.

The Court: All right.

Mr. Kay: May I have that book?

Redirect Examination

By Mr. Kay:

Q. By the way, when you worked for the Army you worked for a walking boss employed by the Army? A. Correct.

Q. Did he ever suggest or direct you to put planking on the—— A. No.

Q. ——on the mechano deck? Now, Mr. Harrison read you a rule, but he didn't read all of it, that is Rule 911. We will read the whole rule. [565]

“When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load.”

And that part is what Mr. Harrison left out.

Mr. Harrison: That is the only part I left out, “face the load.”

Mr. Kay: Let me finish. This is the significant part, and I think you are familiar with this rule:

“Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing.”

Is that right? A. Correct.

(Testimony of Walter Moore.)

Q. And that represents the same situation that you have to take hold of the plane——

Mr. Harrison: Your Honor, this plane was not a draft; maybe a sling load, but not a draft.

Q. (By Mr. Kay): Draft or sling loads, we won't quibble over drafts; the same situation would apply to a plane that is shoulder high?

A. Correct.

Mr. Kay: That is all.

The Court: Any questions? [566]

Mr. Resner: No, Judge.

The Court: You may step down.

The Witness: Okay, your Honor.

The Court: Is that enough for the day, gentlemen?

Mr. Kay: Your Honor, it would be except for one thing. If I may indulge in the Court's time for a little bit, try to get through in this ten minutes we have left, but we have Mr. Bauman, a walking boss from Los Angeles. We thought we would get somebody from that area on this particular question, and if we can't put him on today we will have to have——

The Court: Where from?

Mr. Kay: Los Angeles. I shouldn't have mentioned that.

The Court: All right.

JAMES AUGUST BAUMAN

called as a witness on behalf of the respondent-im-
pleaded; sworn.

The Court: What is your full name, sir?

The Witness: James August Bauman.

The Court: Where do you live?

The Witness: Los Angeles.

The Court: What is your business or occupa-
tion?

The Witness: Foreman, supervisor for Associa-
tion Banning Company.

The Court: And how long have you been so en-
gaged? [567]

The Witness: I have been since 1915. I started
in San Francisco, and I was transferred to Los
Angeles in 1926.

The Court: All right, proceed.

Direct Examination

By Mr. Kay:

Q. Mr. Bauman, you had worked as a longshore-
man; I imagine you started a long time ago, did
you? A. Yes, sir.

Q. How long? A. Since 1915.

Q. And you have worked yourself up to the posi-
tion of walking boss? A. Right.

Q. Now, how long have you been with the Asso-
ciated Banning Company? A. Twelve years.

Q. Down in that area did they do any loading
on mechano decks, these planes on mechano decks?

A. Yes, sir.

Q. And that model you see over there fairly

(Testimony of James August Bauman.)

represents a portion of one? A. Yes, sir.

Q. Now, will you tell the Court whether—well, let me go back a minute. About how many of these vessels did you work on?

A. Well, I would judge around 90, 100.

Q. And on any of those vessels did you ever use planking in [568] connection with putting on planes? A. Absolutely not; no.

Q. And why not, Mr. Bauman?

A. Well, it is a hazard, dangerous. We never even tried it.

Q. Why? Why is it a danger and a hazard?

A. You take planking on top, you're shifting your beams all over the ship, they are loose, might fall off, be unbolted, and if you put any planking on top of that where you move your beams, I don't know what you would do with the planking underneath it.

Mr. Harrison: May I ask, the last question Mr. Kay asked, would he clarify it when he says "planking"? Did you intend to infer a solid planking deck or just a few planks, two planks, one plank?

Mr. Kay: The Lord only knows. That is the contention of the Government and I would like to know just what they mean. That is their position, that is——

The Court: Develop that on cross-examination.

Q. (By Mr. Kay): Did you ever use any planking at all, Mr.——

A. None whatsoever outside of—beg your pardon, outside of where I put cases.

(Testimony of James August Bauman.)

Q. Cases?

A. Yes, taking these parts, the planes we take off the planes, where we put them on the ship.

Q. For the cargo? [569] A. Yes, sir.

Q. And you have those platforms to put the struts down on; is that right?

A. That is right.

Q. And then on some of these planes did you land them with wheels?

A. No, sir; everything was—ours was with the stands.

Q. With the struts? A. That is right.

Q. Is it similar to the strut you see in Libellant's Exhibit 14 here?

A. That is exactly what we use, a three-corner strut.

Q. Tell the Court just how you would land that plane, assuming we got the plane over the area that you are going to land it, how far would that plane be lowered, approximately, and what would the stevedores do in assisting to get that finally on its resting place?

Mr. Harrison: What kind of planes?

Mr. Kay: Well, any kind. I think we are agreed that the operation is substantially the same on all planes, your Honor.

Q. Am I right on that?

A. Yes, sir; very correct. You bring the plane off the barge?

Q. Yes.

A. We always have different signals, and use electric signals [570] with ours, same thing as giv-

(Testimony of James August Bauman.)

ing a whistle or other signals. They bring that plane in there to approximately where the plane will go, drop it down to about two feet, depends on how much you have to move it, and then let it stop, and then everybody, the two men have each stand, come over and steadies that plane. Then you have to go forward or aft, port or starboard, maybe a foot or eight inches, then let it down within two, three inches. I think the stands we use, six by six's, use six by six's instead of the planking like it is here.

Q. For the strut to land on, the platform to land on?
A. Right.

Q. Now, when you mentioned that you moved a foot or eight inches, something of that sort, when that plane is brought over the approximate area is it always put directly over that spot, that landing with that precision?
A. That is impossible.

Q. Yes?
A. Impossible.

Q. Put it in the approximate area?

A. That is correct.

Q. And then you mentioned that you have to help to guide and steady that down?

A. That is right, that is what got the men there for, take off our guy lines and as soon as the men get on the stands, and then whatever position we have to put the man to steady the [571] plane to put her in place.

Q. Will you state whether or not it is customary in the Los Angeles area to hold onto the strut itself in helping to guide that down?

(Testimony of James August Bauman.)

A. Positively.

Q. And when that plane has gotten down to the position where the men can grab that plane do you use these tag lines any more?

A. No, we discard the tag lines and take them off, no good to us any more, absolutely useless to us.

Q. The question of getting that plane down involves both the steadying and the guiding to that particular spot, even if it is a foot or so off the platform, that is, off the top of the platform?

A. Absolutely.

Mr. Kay: Thank you.

Cross-Examination

By Mr. Harrison:

Q. Have you discussed this matter before you came here with Mr. Kay?

A. I talked with the man over there, yes.

Q. How long did you talk it over?

A. About four or five minutes, something.

Q. Is that the only time you have seen him?

A. Yes, sir.

Q. Why did you come up here from Los [572] Angeles?

A. Well, my — some attorneys connected with this company were — I guess, he asked me if I wouldn't go up there, I have done this kind of work pretty close to three years.

Q. Did you talk to the attorneys down there?

A. There, yes, sir.

Q. About what you would testify up here?

(Testimony of James August Bauman.)

A. No, just asked me, told me that had some trouble, some man got hurt and says if I would go up for the company to testify.

Q. I see. Did he tell you that it involved the mechano deck? A. Yes, sir.

Q. Did he tell you it involved the dropping of an airplane? A. Yes, sir.

Q. What else did he tell you?

A. That is about all. I understand somebody was hurt, this man told me about it.

Q. Did he ask you whether walking boards were used? A. Yes, sir.

Q. They did? Now, I asked you what else they talked about. Tell us some more.

Mr. Kay: You asked him what he talked about to counsel.

Mr. Harrison: Counsel in Los Angeles, too.

The Court: I know you did, but you didn't ask him the direct question, whether or not—what was said.

Q. (By Mr. Harrison): What was said with counsel in Los [573] Angeles, as much as you can remember?

A. Well, he asked me if we used any boards in the structure. "No, what do you want boards for, planking?"

Q. Why did counsel from Los Angeles approach you, do you know?

Mr. Kay: Your Honor, that is certainly objectionable. Why? We are looking for witnesses to produce testimony here.

(Testimony of James August Bauman.)

The Court: He is loading this type plane for three years, he says.

Mr. Harrison: I just—I would like to know whether there was any specific reason for his being employed by counsel.

The Court: Very well; ask him.

Q. (By Mr. Harrison): Do you know of any specific reason that they——

A. The only specific reason I know is what—why, he wanted to know if I think using planking on these tanks would be safe, and I says absolutely not, we never allow or used them. We never used them.

Q. You don't know why they asked you?

Mr. Kay: Your Honor, I am going to object to that; that is enough of that.

The Court: The fact that he asked him, I don't think it is possible to prove any more than that, is it? [574]

Mr. Harrison: Well, perhaps——

The Court: Maybe they had a motive, maybe they didn't. But can this witness—did they talk to you more than once?

The Witness: No, sir.

The Court: How long did they talk to you?

The Witness: Well, about five minutes.

Q. (By Mr. Harrison): And then they put you in an airplane and sent you up here?

A. Yes, sir.

Mr. Kay: Your Honor, that is not so. I mean, this man testifying——

(Testimony of James August Bauman.)

Mr. Harrison: Go ahead and explain.

Mr. Kay: I will object, and I think the record will sustain me, that he talked to me for about five minutes, that he had talked to our attorneys in Los Angeles, and they sent him up here.

The Witness: That is correct.

Q. (By Mr. Harrison): How long did you talk to the attorneys in Los Angeles? That is the Judge's question.

A. Well, he asked me to come over to the office, and I probably been there five minutes, a little bit more——

Q. Only five minutes in the office?

A. Ten minutes, I didn't keep track of my time.

Q. But you weren't there very long?

A. No, I wasn't. [575]

Q. And then they put you on a plane?

A. No, they tell me, says, "We're going to have a trial in San Francisco; want you to go up there as a witness."

I says, "Well, if my company will spare me, not too busy, I will be willing to go."

He called me up and says, "Come over to the office, make reservation and be up here on the 19th, and was, come up on the 18th"—— [576]

And he says, "How you going to go up?" And I says, "Well, I prefer by plane." "If the weather condition is not impossible, to let me come up any other way," and he called up the hotel, Wilton Hotel, gave me a reservation for that, and got the airplane.

(Testimony of James August Bauman.)

Q. Who was this gentleman that did all this, who did all this down south? A. Mr. Roberts.

Q. Roberts? A. Yes, sir.

Q. Do you know who he works for?

A. Well, he is our insurance attorney down there.

Q. He is your insurance attorney?

A. Well, my insurance—I know he handles insurance.

Q. For the company for which you work; is that right?

A. Well, I don't know whether he does—I couldn't say that, I wouldn't swear to that.

Mr. Kay: Your Honor—

Mr. Harrison: I am asking the questions, please.

Mr. Kay: I know, but you're getting this man into something he knows nothing about. I will state for the record we have nothing whatever to do with Associated Banning Company.

The Witness: No, I don't know.

Mr. Kay: Nor does Mr. Roberts, whom I happen to know about. [577]

The Court: Do you know what occurred to me? Maybe it is altogether a state of mind; I wouldn't think much of anybody that wouldn't prepare his witness and familiarize himself with what he is going to testify, no matter who it was. I don't think the case can be properly prepared, and yet repeatedly we are examining these witnesses, and sometimes there is good reason for it, but it rarely develops.

(Testimony of James August Bauman.)

Now, I can understand, however, how everything that happened here could have happened very innocently.

Mr. Harrison: Oh, I'm sure of that, your Honor. The only thing I was trying to establish was possibly there was an employee-employer relationship.

The Court: That is all right, you have a right to show that, show any interest that the witness may have in the result of the trial.

Q. (By Mr. Harrison): Now, sir, you have described an operation of loading airplanes whereby you said when the planes are swung over above the mechano deck and then are lowered down into position where they are to be spotted, it is at that time that the men then approach the plane, is that right?

A. The minute the operator stops the plane in that particular instance, why, the men, they are always standing aside until the plane gets back, like, aside two or three feet, all depends on the operator, stops approximately that distance, and the man gets on the stands. [578]

Q. How do you get there, how—walk over to the plane? A. On the mechano deck.

Q. Of course, on top of the mechano deck beams?

A. That is right.

Q. Is there anything to hold onto on those beams? A. No, nothing to hold onto.

Q. He can take hold of the plane; is there anything you can steady yourself with?

A. Steady yourself on the plane.

Q. On the plane itself? A. That is right.

(Testimony of James August Bauman.)

Q. Nothing else to hold onto?

A. That is right.

Q. And these mechano deck beams are how high above the main deck? A. Oh, nine feet.

Q. And when the fore and aft beams are loosened, are they a steady platform to stand, loosened so they keep moving? A. Yes, sir, but——

Q. They don't wobble?

A. The weight is enough to hold them, don't wobble.

Q. Your weight?

A. No, the weight of the beam holds itself in the slot where you got bolts, two double bolts at both ends.

Q. Mr. Witness, I had occasion to go out on one of these [579] with the captain, just loosened the beams, and I stood there, and I have a picture of myself standing on them, and I thought it was very wobbly. Is it your testimony they are not wobbly?

A. No, they are not.

Q. They don't wobble at all?

A. I have walked on hundreds, I never noticed one wobble yet.

The Court: What is the distance between?

Mr. Harrison: It is twelve feet between the thwartship beams, they were twelve feet from here to here (indicating on the model).

The Witness: That is correct.

The Court: Now, what is——

Mr. Harrison: These beams are approximately thirteen feet long.

(Testimony of James August Bauman.)

The Court: Thirteen feet long. And what are the dimensions?

Mr. Harrison: The beam here is six inches in width.

The Court: Yes.

Mr. Harrison: And as I say, I think it is between thirteen and fourteen feet long; the space in between is twelve feet.

The Court: That would be, the beams would—that thirteen feet total dimensions?

Mr. Harrison: The beams, they are thirteen feet long, your Honor.

The Court: The ones—— [580]

Mr. Harrison: Thwartship beams.

The Court: Going the other way?

Mr. Harrison: Fore and aft?

The Court: Yes. Six?

Mr. Harrison: Six inches wide and—I have the dimensions.

The Court: Six inches wide and——

Mr. Resner: If your Honor will allow me to help Mr. Harrison——

Mr. Harrison: I have them right here.

Mr. Resner: Here are two photographs. We will offer them on libelant's case. We have pictures showing the beams on the Shawnee Trail.

The Court: Did you see those pictures?

Mr. Harrison: No, I haven't seen these pictures.

The Court: Look at them, see if they are——

Mr. Kay: I think we can stipulate, all counsel

(Testimony of James August Bauman.)

will stipulate these are metal beams, all these that we are talking about are metal.

Mr. Harrison: Yes, they are. This doesn't indicate which beam——

Mr. Resner: All you have to do is look at it, Mr. Harrison, to tell it is one of the movable beams.

Mr. Harrison: Well, let's see what it is.

Mr. Resner: You can see it fits into the slot beam; the [581] slot beam is the stationary beam, and the single beam is the movable beam, and this is over the slot beam.

Mr. Harrison: Your Honor please, the picture shows just as I stated, it is six inches in width.

The Court: All right.

Mr. Resner: I don't think there is any quarrel about it.

Mr. Harrison: The judge asked me, you asked me for the further dimensions, your Honor?

Mr. Resner: I might tell you, your Honor, that the single beam is the movable beam, and the slot beam, the double one, is the solid one.

Mr. Harrison: Your Honor please, would you like some further dimensions on this?

The Court: What is it?

Mr. Harrison: The specifications which I have, your Honor, show it is six inches in width; it is also six inches in height, and it is thirteen feet long.

The Court: The dimensions of the cross——

Mr. Harrison: The thwartship beams?

The Court: Yes.

Mr. Harrison: Are fourteen and a half inches in

(Testimony of James August Bauman.)

width, your Honor, this way (indicating) and they are 32 feet long, and the distance between them is twelve feet.

The Court: All right.

Mr. Resner: What numbers are the two pictures? [582]

The Clerk: Libelant's exhibits 38 and 39.

Mr. Resner: May they be received, your Honor?

The Court: They may.

The Clerk: Admitted and filed in evidence.

(Whereupon the two photographs referred to were received in evidence as libelant's exhibits 38 and 39.)

Q. (By Mr. Harrison): And is it your testimony that you walk about these beams and perform the operations of steadying and landing these airplanes without any support whatsoever?

A. Yes, sir.

Mr. Harrison: Thank you, that is all.

Mr. Kay: One question.

The Court: What is that?

Mr. Kay: One question, may I, your Honor?

The Court: I didn't hear you.

Mr. Kay: This will be just one question.

The Court: All right.

Mr. Kay: I assure you.

The Court: I wanted to be sure.

(Testimony of James August Bauman.)

Redirect Examination

By Mr. Kay:

Q. All of these ships that you were on, you said 90 to 100, doing this operation, did you ever see or know of any accident to any of the stevedores working on there? A. No, very fortunately not.

Mr. Kay: That is all. [583]

Mr. Harrison: That is all.

The Court: Thank you.

The Witness: Thank you.

The Court: We can adjourn until Monday morning at ten o'clock.

(Whereupon an adjournment was taken until March 24, 1952, at ten o'clock a.m.) [583A]

Monday, March 24, 1952—10 o'Clock A.M.

The Clerk: Frank Luehr vs. United States of America, American Pacific Steamship Company vs. Jones Stevedoring Company, on trial.

Mr. Resner: Ready.

Mr. Kay: Ready.

Mr. Harrison: Ready.

Mr. Cooper: Ready.

Mr. Kay: May we proceed, your Honor? Call Mr. O'Brien.

TIMOTHY WILLIAM O'BRIEN

called as a witness on behalf of respondent-im-pleaded, sworn.

The Clerk: Please state your full name to the Court.

(Testimony of Timothy William O'Brien.)

A. Timothy William O'Brien.

Direct Examination

By Mr. Kay:

Q. Mr. O'Brien, what is your present situation?

A. I am presently the attorney for the California State Employees Association.

Q. And prior to that?

A. I was Deputy Attorney General in the Attorney General's office, Sacramento; civil service.

Q. When was that, Mr. O'Brien?

A. I joined the staff there in January, 1949, and separated in May, 1951, to take my present position. [584]

Q. So now you represent the State Employees Association? A. I do.

Q. And before you became associated with the Attorney General's office, what was your occupation?

A. Well, going back, during World War II, I was originally assigned to the Stockton in-transit depot and then transferred to San Francisco in May of 1942. I was then assigned to the Port Air Office which subsequently became Pacific Overseas Air Service Command. My assignment on joining the staff of the Port Air Office was to Oakland outer harbor where the Air Force maintained a liaison office to handle contacts between the water division of the Transportation Corps, the United States Navy, private operators and the Air Force.

(Testimony of Timothy William O'Brien.)

In that capacity I handled all Air Force loading for various destinations, both of assembled aircraft, boxed aircraft, parts, and the entire field, which might go all the way from your radio parts to your A-26's, which were loaded on the decks of aircraft carriers at Alameda.

Q. And in that connection, Mr. O'Brien, I assume you had experience in loading the planes on mechano decks such as we have in that model over there, is that correct?

A. Yes, the mechano deck, if my recollection serves me correct first came into use in 1943, about '43. In the early part of the war I had no contact with that type of deck. However, in 1943, the same appeared and we loaded a great many [585] ships with assembled aircraft, mainly P-38's, P-47's that had mechano decks. All, of course, were tankers.

Q. Then it would be—would it be proper to say that you loaded many, many tankers, that is, you have loaded planes of various types on many, many mechano decks?

A. Yes, I had. I wouldn't want to give an exact figure, but I could approximate that there were a great many, at least one every week or two.

Q. And are you familiar with the type of plane that is here on Libelant's Exhibit 14?

A. Looking at it it is obviously an F—it is obviously a jet aircraft, and I notice from the mark on the fuse it is an F-80.

Q. Thank you. Did you have experience in the loading of planes from a barge alongside the tanker?

(Testimony of Timothy William O'Brien.)

A. Yes, that was the method we adopted for bringing aircraft from the processing depot to the ship for loading.

Q. And would you state whether or not the loading operation would be substantially the same regardless of the type of plane, that is, where you used a crane, a barge crane?

A. Yes, the loading operation for tanker loadings was done by barge crane from the offshore, and as the barge would be brought alongside by a tug, and would be made fast with necessary lines, and then the—that is, the derrick barge would be, and then the aircraft brought alongside the derrick [586] barge, lifted from the barge where the aircraft were to the tanker.

Q. Could you describe to the Court just how that operation would be done, please?

A. In sequence of time, initially a tanker would be brought to the dock. Generally when we received it they were loaded. We would then—then the derrick barge would be brought alongside. I have seen this done both with the crane derrick barge, and with the type that Haverside has in San Francisco.

Q. Pardon me, just a moment. This crane that is shown in these photographs, are you familiar with that?

A. Yes. The Army had one of very similar structure at Outer during the war. I am not sure whether it is an identical barge, but it was very similar. That barge would be brought alongside, and then the aircraft would be brought alongside

(Testimony of Timothy William O'Brien.)

offshore, the barge, and the whole group had to be lined up as to how they were going to start to stow.

Then we would have stevedores, both on the deck of the ship and on the barge, which was offshore of the derrick barge. The plane would be released from its moorings on the offshore barge, after your bridle had been attached, and your line had been dropped from the crane and attached to the bridle. Then there were tag lines attached to the aircraft to prevent it swinging in the wind and to control its general movement, as you moved it from the offshore barge to the deck [587] where it was going to be stowed.

Then the entire operation was controlled by a boss who had a whistle, and he would control by the notes on these whistles the motions of the derrickman who sometimes wasn't in a position to completely observe the entire operation.

Then following his signals the aircraft would be lifted from the barge. On this we had various types of bridles, depending upon the aircraft being loaded. It would be slung across and brought aboard, or not aboard, but over the tankers. It would then be guided into general position above the point where it was finally designated to come to rest.

Well, at this point I had better fill in the fact that there were prepared platforms, these little platforms for resting the struts, with their little special frames for lag screwing those struts to the deck.

Q. Pardon me, would that be the same as what we call tripods?

(Testimony of Timothy William O'Brien.)

A. Yes, we called them tripods then. I might fill that in by way of background. In the processing operation our general procedure was to process the aircraft for shipment at Day Brothers who operated a hangar at the Oakland Municipal Airport. The barge would then be brought to the Oakland Municipal Airport and the aircraft would be lifted from the dock to the barge. At the time this transfer took place from the dock in Oakland the wheels were removed and tripods were put on. Also on the strut you would put a collar around the strut, [588] they called it, in order to fasten your lashing lines for the purpose of securing the aircraft to the deck of the tanker, or to any other type of deck you were working on.

Now, to go back to the aircraft, the aircraft would come over the deck of the ship, already had the collar on, and the tripods on. Then we would start to lower and it would come down toward the deck.

Now, the mechano deck had a certain problem in that we never had everything in exact position as to—so that the platforms to which the airplane was being loaded would exactly coordinate with the part of the airplane we had to get on the platform, namely, your landing gear assemblies.

When it came down to a certain point, generally it was high enough so you could walk in under the aircraft while working on these irons which makes up the mechano deck. Then you would go underneath, line it up, and then bring it down. There were two reasons you had to go under, one was to

(Testimony of Timothy William O'Brien.)

line it up so they are square on the platform, and secondly, the tripods weren't perfectly balanced, so that if you didn't exactly set them in line as you dropped it onto the deck, the natural result it would come up with a little angle one way or the other. But that is substantially the procedure the stevedores did, they did go in under the aircraft, grabbed the landing gear, guided her into the final position, and then dropped her on the deck, meaning onto the prepared platform, [589] making sure the tripod was absolutely flat.

Q. Now, let me ask you, Mr. O'Brien, assuming that the plane wasn't just over that platform, as you mentioned, you can't get them, just off, say it is off a foot or so off to the side of it, and it has been stopped by the whistle man, at a height allowing the men to hold onto the plane, or the strut or gear, now, will you state whether or not in the course of that operation it would be necessary to have men to get hold of the plane at that point?

A. It would be, because the aircraft was never allowed to swing free once it came in any area where it could come in contact with an obstruction; of course, the best thing to hang onto under those circumstances would be the struts and the other—well, that would be the only thing underneath you could have grabbed.

Q. In all of these operations, Mr. O'Brien, can you recall any instance in which planking was ever used on the mechano deck other than these platforms that I am speaking of?

(Testimony of Timothy William O'Brien.)

A. None in the loading of the aircraft whatsoever.

Q. I will ask you this, Mr. O'Brien: Is a plane load such as the plane here that would be coming down to the mechano deck, that is, that plane coming over, would you call that a sling load?

A. No, I had understood it was a lift load. To me a sling load contemplates a duckboard, pallet board, something of that [590] sort, which is a different type of operation.

Mr. Kay: That is all.

Mr. Harrison: You have any questions?

Mr. Resner: No questions.

Cross-Examination

By Mr. Harrison:

Q. You're an attorney, Mr. O'Brien?

A. I am.

Q. Where do you presently reside?

A. 4610 Marian Court, Sacramento.

Q. Sacramento. Did you come down here to testify in this case? A. I did.

Q. How old are you, Mr. O'Brien?

A. I am thirty years of age.

Q. Where did you go to law school?

A. University of San Francisco.

Q. When did you get out, Mr. O'Brien?

A. I graduated in March—in June of 1948.

Q. June of '48. You're thirty years of age, so in 1943 when you first came in contact with mechano

(Testimony of Timothy William O'Brien.)

decks you were how old? Let's see, that is——

A. Either be 21 or 22, according to my mathematics.

Q. About 22 years old; is that right?

A. Yes.

Q. You say you were supervising the loading of these airplanes? [591]

A. I did not say I was supervising, I did supervise on behalf of the Air Corps. The actual lift operation was directly the responsibility of the Army Transportation Corps.

Q. How long were you in the—were you in the Service at that time?

A. Well, I was exempt as being in essential work until October of '43.

Q. I see.

A. At which time my draft board required my presence in the Army. I was inducted and reassigned to my previous assignment identically at the Oakland Outer Harbor.

Q. What was your rank, Mr. O'Brien?

A. I was a staff sergeant at induction.

Q. You were a staff sergeant? A. Yes.

Q. And you would like us to believe that a staff sergeant, a 22-year-old staff sergeant had the responsibility and the direction of loading these airplanes?

Mr. Kay: Just a moment. That is incompetent, irrelevant and immaterial, improper cross-examination, argumentative. This witness has told what his duties were, now he is arguing the point.

(Testimony of Timothy William O'Brien.)

The Court: Goes to the weight of the testimony; I will allow it.

The Witness: Is that a question? [592]

The Court: Just a moment. Read the question.

(Question read by the Reporter.)

A. Well, that—my responsibility was to represent the Air Force in all of those loadings at Oakland Outer Harbor. I reported directly to Lieutenant Colonel F. I. Nystrom, I was neither assigned to a squadron of any type or to the headquarters, I was left completely on my own. I reported to no squadron, no first sergeant, or anything of that type.

Q. (By Mr. Harrison): Do you know whether or not Mr. Nystrom ever testified in this case?

A. I talked to him on the telephone, I was in Long Beach at the time, and he phoned me and asked me if I would come up and testify as to my recollection concerning the—and experience concerning the loading of assembled aircraft on a mechano deck.

Q. You worked under Mr. Nystrom?

A. I was responsible directly under F. I. Nystrom, Jr.

Q. Now, you said you were associated with loading these airplanes at least one every two weeks, I believe that is your testimony?

A. That would be approximate, I don't know how many tankers I actually loaded or inspected. There were a great number.

(Testimony of Timothy William O'Brien.)

Q. Yes. How long did you work in that occupation?

A. I first became associated with that directly in December, 1941, Stockton in-transit depot. I left San Francisco in [593] April, 1945, on an overseas assignment to the A-4 section, which is a supply section of 308 Bombardment Wing, which operated as advance command for the Fifth Air Force. In that operation I was directly concerned with water transportation, but not with the handling of assembled aircraft, because most of our movement had to do with LST's, the airplanes flying from point to point.

Q. Then you say you first became associated with the loading activities in 1941, but you didn't see a mechano deck until 1943, is that right?

A. That is my recollection.

Q. You went overseas in '45? A. I did.

Q. Did you see mechano decks during the course of your—those two years from '43 to '45?

A. I saw a great many mechano decks during that period.

Q. And during that period you were 22 years old and you came to be 24 during that period, is that right?

A. Well, that would be approximately correct.

Q. Did you ever go up in grade above the staff sergeant?

A. I received an appointment to OCS, but they closed OCS for the Air Corps in that particular category, they wouldn't release me to OSC in the

(Testimony of Timothy William O'Brien.)

Transportation Corps. Overseas I was promoted to a tech sergeant.

Q. I see. Never became a commissioned [594] officer? A. I never did.

Mr. Harrison: I believe that is all.

Mr. Resner: No questions, your Honor.

Mr. Kay: I have no further questions. I wonder if we may ask for a recess now. There is another witness I had hoped would be here, and we can check on it.

The Court: Take a recess.

Mr. Kay: Thank you.

Mr. Mordock: I believe Mr. Cooper may possibly want to ask this witness some questions.

The Court: You can ask the questions in the absence of Mr. Cooper.

Mr. Mordock: Your Honor, I am not familiar with what he has testified, I am not familiar with what he testified, I just came into the courtroom.

The Court: You just came in?

Mr. Mordock: Mr. Cooper just stepped out. In case he does, I would like to reserve that until——

The Court: You take that up with Mr. Cooper, and I will give you the opportunity, and you can take the place of Mr. Cooper in his absence.

Mr. Mordock: Very well, sir.

The Court: I will encourage you to do so.

(Short recess.) [595]

Mr. Kay: Your Honor, this witness we had in mind, which is for cumulative evidence, hasn't

(Testimony of Timothy William O'Brien.)

shown up. We have another witness, but I understand Mr. O'Brien was to be cross-examined by Mr. Cooper.

Mr. Harrison: I would also like to ask one or two questions of Mr. O'Brien.

The Court: Take the stand.

(Thereupon Timothy William O'Brien was recalled as a witness for the respondent-impleaded, previously sworn.)

Cross-Examination

(Continued)

By Mr. Harrison:

Q. Mr. O'Brien, I believe that Mr. Kay showed you Respondent's Exhibits B-1 and asked you to identify that airplane, is that correct?

A. No, he showed me 14.

Q. Can you identify that plane (handing photograph to witness)?

A. It looks most like an F-88 to me, although there is a central air scoop on both the F-88 and the F-80.

Q. Mr. Kay showed you Libelant's Exhibit 14, which you identified as an F-80?

A. Yes. That was from the markings on the fuse.

Q. I see. Now, does the trailing edge of the wing appear in that picture, Mr. O'Brien?

A. The trailing edge, as I understand it, is this part of the wing right here (indicating).

Q. Yes. That is the trailing edge of the wing, is that right? [596]

(Testimony of Timothy William O'Brien.)

A. Yes, as I understand it.

Q. How thick is the trailing edge of the wing, do you know, Mr. O'Brien?

A. On what aircraft, sir?

Q. On this particular aircraft.

A. I don't know. I have never had personal contact with an F-80. I believe it would be similiar to the aircraft—other aircraft. That is, the forward part of the wing streamlines back to the back part of the wing, some, maybe breaks off just as thin as is practically possible within structural limitations.

Q. I see. You were indicating something under an inch, is that correct?

A. As I remember it, it was.

Q. It is under an inch thick, is it?

A. Of course I have had no personal contact with an F-80, because——

Q. (Interposing): From this picture how thick does it appear?

Mr. Resner: I am going to object to that. The witness has stated he is not able to tell, and obviously one looking at a picture which is not to scale cannot testify and give an intelligent answer.

Mr. Harrison: Why isn't a picture to scale? I don't understand that, your Honor.

Mr. Resner: I am sure there isn't a man in the world [597] who can do that, Mr. Harrison.

Mr. Harrison: Well——

A. It appears to be quite thin structurally as

(Testimony of Timothy William O'Brien.)

compared to the rest of the airplane, is about the best answer you can make.

Q. (By Mr. Harrison): I see.

A. I haven't put any measuring gauge on it at the exact ending of it.

Q. Is it at least thin enough so that a man's hand would fit over it, is that correct, in the manner which I have demonstrated?

A. It is thinner than that.

Q. It is thinner than that? A. Yes.

Mr. Harrison: I see. I believe that is all I have.

Mr. Cooper: I have only one question, your Honor.

The Court: What is that? What did you say?

Mr. Cooper: I may have, perhaps, only one question. It may be of some assistance here and may not. I submit the question.

Cross-Examination

By Mr. Cooper:

Q. Young man, from your experience and observation, how many tag lines are customarily attached to a plane of this general type in landing it on deck?

A. Of that general type, with tricycle landing gears, we had [598] there, were, I believe, three tag lines attached as your point of contact to the protruding struts.

Q. That was going to be my next question. Where are the tag lines usually attached?

A. You had to attach them, as I remember it, right on the aircraft. We would attach them to the

(Testimony of Timothy William O'Brien.)

struts, which form a "V," so you could put your necessary——

Q. (Interposing): Will you tell us at what particular point of the struts they are attached, usually?

A. As I remember that, we tied them to the tripod.

Q. A tripod I visualize as being like the thing a photographer uses. It has a leg on it, hasn't it?

A. It has three legs. The bottom structure going around——

Q. (Interposing): When you attach them to the tripod, that does not mean anything to me. What point of the tripod is it, usually?

A. There is no particular point. The line would be unfastened before you actually set it down on the deck.

Q. Excuse me, I am not asking what happened to it. I am simply asking a simple question where it is customarily attached.

A. It is tied to the point of the tripod where it could be tied, generally.

Q. It has no particular location?

A. No, it has no particular location of insertion. It would [599] be tied by the stevedores on the barge prior to the left from the barge.

Q. Using their own discretion where to tie it?

A. Provided they didn't tie it to something completely improper. They could tie it to the tripod without making trouble. If they do something wrong

(Testimony of Timothy William O'Brien.)

it is up to me or somebody representing the Air Force. It had to be tied to the points on the aircraft, or the—some point on the aircraft where it wouldn't damage anything.

Q. The main concern is to tie it where it wouldn't damage part of the plane?

A. There were two main concerns, one, to have the proper guidance of the tag lines. They had to be placed somewhere so that the aircraft could be guided while it is hanging and where it would not swing, or you had sufficient control and balance around it so that it wouldn't go swinging into something.

However, in that limitation, your second limitation was that it had to be tied somewhere on the aircraft that would not damage the assembly of the aircraft.

Mr. Cooper: I think that is all.

Mr. Resner: No questions, your Honor.

The Court: Step down.

The Witness: Thank you, your Honor.

(Witness excused.) [600]

Mr. Kay: We will call Mr. Stanley Davis.

STANLEY CHARLES DAVIS

called as a witness for the Respondent-Impleaded,
sworn.

The Clerk: State your full name to the Court.

A. Stanley Charles Davis.

(Testimony of Stanley Charles Davis.)

Direct Examination

By Mr. Kay:

Q. Mr. Davis, what is your present occupation?

A. I at the present time am mining.

Q. Where?

A. In Nevada. Northeast corner of Washoe County.

Q. How long have you been doing that?

A. Since the latter part of October.

Q. Mr. Davis, you have been connected with safety work, haven't you, prior to that time?

A. Yes, sir.

Q. In what capacity and with what organizations and for what period of time?

A. As safety supervisor for the Maritime Association of the Pacific Coast from April 1, 1929, up until—my affiliation with them terminated the 15th of October, 1951.

Q. Then you went with that organization from about its inception, is that about right?

A. Yes, sir.

Q. Are you familiar with this booklet, Respondents' Exhibit A?

A. Yes, sir. That is the Pacific Coast Maritime Safety Code. [601]

Q. And are you familiar, Mr. Davis, with the operation of loading airplanes generally, including jet planes, onto the mechano deck of tankers?

A. Yes.

Q. Where a barge crane is used to put the plane

(Testimony of Stanley Charles Davis.)

over onto the mechano deck? A. Yes, sir.

Q. Can you tell us what a skeleton deck is?

A. A skeleton deck, there are two different types.

Mr. Harrison: If your Honor please, just for the record I object to the question on the ground no proper foundation has been laid. I don't know whether this man has ever been aboard a ship.

Mr. Kay: Very well, we will lay lots of foundation.

Q. Mr. Davis, how long have you engaged in this accident prevention work?

A. Since 1929 up to the middle of October, 1951.

Q. In the period of those years have you had occasion to go aboard vessels?

A. Yes, sir, hundreds of them.

Q. Have you been aboard vessels with mechano decks while they were loading aircraft on them?

A. Yes, sir.

Q. How many? A. Dozens of them. [602]

Q. Have you been aboard vessels in the old days before mechano decks were invented?

A. Yes, sir, I have been.

Q. Now, will you tell us what a skeleton deck is?

A. A skeleton deck is a temporary deck constructed in the holds of a ship. One type is for handling cargo which may be stowed in the wings or fore and aft of the hatch that the longshoremen cannot reach without a higher deck to go on.

Another type of deck is one that there was a temporary double deck for automobiles or machinery in the holds of ships.

(Testimony of Stanley Charles Davis.)

Q. This skeleton deck you have described, does it have movable beams like these (indicating) on a mechano deck? A. No, sir.

Q. This mechano deck, is that constructed of metals? A. It is.

Q. Are these skeleton decks you have described constructed of metal?

A. No, sir, they are constructed of lumber.

Q. Can you tell us whether an airplane attached to a line to be lowered on a mechano deck is a sling load? A. No, sir.

Q. With respect to these rules, Mr. Davis, I take it you are thoroughly familiar with them, is that right? A. Yes, sir.

Q. You were back there in 1929 when they formulated these [603] rules, is that right?

A. I was, sir.

Mr. Harrison: Your Honor please, I don't want to interpose a formal objection, but I might suggest Mr. Kay's questions have been very leading and suggestive.

Mr. Kay: Oh, that kind of question is so preliminary——

Q. (By Mr. Kay): I show you Pacific Coast Marine Safety Code dated November 6th, 1931. Are you familiar with that? A. Yes, sir.

Q. Will you state whether or not your name appears in that book?

A. Yes, sir, it does, under the heading of Board of Technical Advisers.

Q. In other words, here you are listed on the

(Testimony of Stanley Charles Davis.)

Board of Technical Advisers as follows: "Stanley C. Davis, Association's accident prevention department, San Francisco, California," is that right?

A. That is right, sir.

Mr. Kay: Your Honor, we would like to offer this in evidence.

The Court: It may be admitted and marked.

Mr. Harrison: What is it, Mr. Kay?

The Court: Identify it for the purpose of the record.

Mr. Kay: Pacific Coast Marine Safety Code dated November 6th, 1931. [604]

(Document referred to was thereupon admitted into evidence as Respondent's-Impleaded Jones Exhibit No. 1.)

Q. (By Mr. Kay): That book, Mr. Davis, does that contain rules that you have in this one of 1949, Respondents' Exhibit A? A. Yes, sir, it does.

Q. They are differently numbered, however, are they?

A. They are differently numbered, and the rules are put in various sections. That is the only difference.

Q. Will you tell us, Mr. Davis, whether there are situations encountered in loading and unloading a vessel that are not covered by the safety rules?

A. Yes, there are numerous situations.

Q. What situation—withdraw that. When these rules were promulgated—that is, from 1929 up to the present time—were the parties to the rules aware

(Testimony of Stanley Charles Davis.)

of the fact that there were situations that were not covered by the rules which were apt to develop in stevedoring situations? A. Yes, they were.

Q. Are there any rules that specifically cover the operation of loading jet planes onto mechano decks——

Mr. Harrison: I object to that, calling for an opinion and conclusion of the witness.

Mr. Kay: Can I finish the question?

Mr. Harrison: It is the Court's duty to determine whether or not these rules apply to this type of work. [605]

Mr. Kay: May I finish the question, your Honor, then objection might be made. I hadn't even finished the question.

The Court: Yes.

Mr. Resner: If your Honor please, might I have the statement of Mr. Harrison's read back?

The Court: Read it, Mr. Reporter.

(Objection read by the reporter.)

A. What rules?

Mr. Kay: I will try to finish the question, then we will see.

Q. Mr. Davis, in connection with these Pacific Coast Marine Rules, with which you are thoroughly familiar, you testified, is that right? A. Yes.

Q. I will ask you whether or not in those rules there are any that specifically cover the operation of loading a jet plane onto a mechano deck of a tanker? A. No there are not.

(Testimony of Stanley Charles Davis.)

Q. And I will ask you this: were rules 813, 820, 901 and 901 promulgated before mechano decks and jet planes were invented? A. They were.

Mr. Kay: I have no further questions.

Mr. Harrison: Do you want to aid your associate, Mr. Resner? [606]

Mr. Resner: I feel counsel's remark is unwarranted. I am here representing Mr. Luehr, nobody else.

Mr. Harrison: Pardon me.

Mr. Resner: Maybe you didn't have a good night's rest, Mr. Harrison.

The Court: This being Monday morning, you have to make a little allowance.

Mr. Harrison: Thank you, Judge.

Cross-Examination

By Mr. Harrison:

Q. Mr. Davis, Rule 901 of the 1949 edition of the Safety Code says, "Sling load shall not be put or suspended over men's heads." That is a very general rule. Do you think that rule is general enough to cover this situation of loading planes on mechano decks? A. No, I do not.

Q. In other words, you think it is perfectly all right to suspend sling loads over men's heads when loading planes on mechano decks?

A. If it becomes necessary for them to do so in the operation.

Q. But only when it becomes necessary, is that

(Testimony of Stanley Charles Davis.)

correct? A. When it becomes necessary.

Q. And only when it becomes necessary?

A. When it becomes necessary.

Q. Have you ever had anything to do with actually loading one [607] of these in a supervisory capacity? A. No, sir, I have not.

Q. Then you are not qualified to testify whether or not or when or if it becomes necessary, are you?

A. I believe I am.

Q. You said you never had anything to do with it. How do you qualify yourself?

A. In my capacity as a safety supervisor, it is our duty and was our duty to visit all vessels loading or dispatching cargo in this port.

Q. I see.

A. Especially those vessels who the stevedores doing the stevedoring work aboard them are members of the Association in which we service, and our particular duty was to investigate and study the various methods of operation in order to determine whether or not we could reorganize any safety precautions.

Q. Then you think you are qualified to testify— A. I believe I am.

Q. —the proper method of doing this operation? A. I believe I am.

Q. Let us assume the plane had gone over and arrived at a spot over the mechano deck, but the struts which are to be landed on the platform which is placed on top of the mechano deck have not yet

(Testimony of Stanley Charles Davis.)

arrived over the platform. Do you understand [608] my question? A. I understand.

Q. Perhaps I can demonstrate it better, your Honor, I have taken the liberty of investing ten cents of my own money in this. Would you step over to the model, please?

A. Yes, sir (going to model).

Mr. Harrison: I don't represent this as being to scale at all. I think I can demonstrate the question which I would like to ask.

Q. (By Mr. Harrison): The plane is being slung from the offshore side and is now over to the inshore side, and let's assume that it has passed the blocks and is too far inshore. Do you understand what I mean? A. I understand.

Q. And the landing gear, if the plane were lowered straight down, would miss the platform and the plane would land on its belly. Do you understand what I mean? A. I understand, yes.

Q. At that stage of the game is it necessary for the stevedores to grab hold of the struts or to go underneath the wings?

A. I take it—may I ask, your Honor, that this is the point at which it will be landed is five or six feet beyond where it eventually will be placed?

Q. Well, it has gone—well, let's see. It has come to a [609] point two or three feet away from the platform and directly over the platform.

A. May I answer that this way: When that plane is brought inboard by the crane, it is landed at as

(Testimony of Stanley Charles Davis.)

near the point where it will be permanently spotted as possible.

Q. You mean to say, it is suspended?

A. As near as possible. Then when it is near a point as near as possible, that is, placed by the crane as near as it possibly can, then it is necessary for the men to go underneath and grab that and hold it to keep it from swinging.

Q. It is true after they suspend the airplane, Mr. Davis, they frequently move the mechano deck beams and move the platforms so that it will be underneath the struts?

A. If the fore and aft beams are not in correct position, it is necessary for them to do that.

Q. They move the struts?

A. If necessary, yes, sir.

Q. After the platforms are where they decide to leave them, they swing the aircraft until the airplane is over the place, is that right?

A. That is right, and that is held and steadied and guided by the men themselves into place.

Q. Then after it is suspended so that it is over the platform, the only thing necessary to do at that time is steady it in place from swinging, is that [610] right? A. That is right.

Q. That is the only thing to be done?

A. Has to be steadied from swinging in order to keep it from striking any fixed object or any other plane which may have been lowered previously on the deck.

Q. When the plane gets in position over the plat-

(Testimony of Stanley Charles Davis.)

form, then the men go underneath and get it down to the platform, is that right?

A. That is correct.

Q. And then only, is that correct?

A. When it is at a point as close as the crane can spot it. The crane will spot it as close as he possibly can, and if necessary they will go under.

Q. If the crane operator had the plane suspended over the platform, it is still necessary for him to make an operation which would move the plane either inshore or offshore to get it over?

A. A distance of six or seven feet, yes, but a distance of two or three feet, no. That distance, two or three feet, the men can do themselves, grab the line and turn it to swing three or four feet.

Q. Well, if they are going to attach it, it is necessary to have the plane suspended directly over the platform, is it not?

A. Very probably. [611]

Q. You don't mean to tell me when they lower the plane, got to hold it?

A. They are holding it. They will steady it.

Q. After it is spotted over the platform?

A. Nearest position.

Q. I see. That is all. Will you take the stand again?

(Witness resumed the witness stand.) [612]

Q. You have described a skeleton deck for us, Mr. Davis. I don't believe Mr. Kay read Rule 813, because I am sure which he was referring to, which states this:

(Testimony of Stanley Charles Davis.)

“When it is necessary to work a cargo on a skeleton deck, safe decking shall be provided unless the workmen can work safely from the cargo stowed below such skeleton deck.”

What is the purpose of a rule requiring that there shall be decking over skeleton decks?

A. Well, the rule, decking—as I stated before, your Honor, the skeleton deck, as contained in that rule, consists of a skeleton deck constructed in the hold of the ship, in the opening of a hatch.

Q. I understand.

A. And that deck, if it is constructed there to remove cargo from the hold of the ship, then it is constructed by using hawsers or stacking up pallet boards where the men can easily remove the cargo from the hatches. All fore and aft of hatches until they get down to the level where they can lower from the deck——

Q. My question is, what is the purpose of the wording in the rule which says, “safe decking shall be provided on a skeleton deck”?

A. Safe decking, to give them a safe footing.

Q. To give them a safe footing? [613]

A. On a skeleton deck.

Q. What would you—how wide would you say the footing had to be for a safe footing?

A. I think the pallet boards use a four-foot board, and then they would stack them up across the hatch, and you would have a footing there with an opening between the boards and the pallets;

(Testimony of Stanley Charles Davis.)

which would range anywhere from two inches up to four inches.

Q. You mean two inches for a man to stand on?

A. No, four-inch board, and the board is four-foot square, you may have four turns of them across: if they are four feet, well, you have four tiers you would have sixteen feet by four feet footing.

Q. Then you would say a safe footing requires at least, about four foot square?

A. Yes, in a—the skeleton deck in the hold of a ship, four feet would be sufficient.

Q. And the purpose of requiring decking on a skeleton deck is to provide a safe footing, is that correct?

A. Not necessarily to provide only safe footing, but to get your men up high enough so he can handle the cargo out of the sling.

Q. In other words—withdraw that.

But the purpose of putting the decking or the mechano deck is to provide safe footing, is that correct? [614]

A. Wait a minute, you are talking about mechano decks?

Q. I mean, the skeleton deck, excuse me.

A. Yes, to provide a safe footing.

Q. You say a safe footing would be defined as something at least four feet wide, is that right?

A. Yes, four feet wide.

Q. You have testified that you would not term a plane suspended on a cargo fall a sling load?

(Testimony of Stanley Charles Davis.)

A. Yes, sir.

Q. Is that correct? What would you call the lines that they put underneath the wings of the plane to suspend it?

A. You mean to steady them?

Q. No, to suspend the thing that the plane is actually attached to?

A. Bridle.

Q. Bridle?

A. Bridle.

Q. Would you call this a bridle load as distinguished from a sling load?

A. No, I would call it a lift, you have one that you lift, you ordinarily call it a lift in the stevedoring operation terms.

Q. A lift, I see. Now, Rule 911 says:

“When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in [615] the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing.”

Now, the term sling load is used there. Would you say that the same rule pertains to a lift?

A. Would you make that a little plainer so I can clarify myself in your question? You mean that that rule pertains to the lift when it is down to the point where it must be guided into position?

Q. Well, the point I am trying to make is this, Mr. Davis. The rule says, I will read only the per-

(Testimony of Stanley Charles Davis.)

tinent part of it, Mr. Kay, the rule which I feel pertinent:

“When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object,” and the load, I assume.

Now, would you say that that portion of the rule would apply equally well to a lift?

A. No, I wouldn't.

Q. Why not?

A. Because only lifts—it becomes necessary in various operations for the men to walk in and grasp that load in order to steer it and of course walk it into position where [616] it is going to be landed.

Q. Yes. Is it ever necessary for a man to walk—it says that, the remainder of the rule says:

“Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing.”

Now, is it your testimony that that rule does not apply to a lift?

A. That would apply to a lift or anything, because they would naturally stay out from under it until it came to shoulder height, and when it gets to shoulder height it becomes necessary for them to control the load.

Q. Now, isn't it true that the reason that they require it to come to shoulder height is so that the

(Testimony of Stanley Charles Davis.)

men can steady by putting their hands out directly in front of them? A. Yes.

Q. The rule requires them to come down to shoulder height so the men won't have to reach under there and consequently be under it (indicating)?

A. May I say that rule pertains generally to the handling of loads in a hatch, and when you are loading cargo and a load will come in, and then the longshoremen in a hold will take the cargo from the board or scow and stow it in the ship, and while they are doing that they may start to bring another load in, and that pertains to the fact that [617] they shall stand clear of that load, and there is a rule there that calls for them to hold that load until men in the hold are ready for it, and they can get in the clear and not be in the line of travel.

Q. I understand. And you say that the rule does not apply to deckloads at all?

A. Now, deckloads, you are giving that a lot of territory.

Q. You took in a lot of territory, you said the rule applied mainly to loading in the hold; does it apply to loading——

A. May I answer the question this way: That the men will stand clear until the whistleman has landed or spotted that load as near as possible over the point where he intends to land it permanently.

Q. I see.

A. Then it becomes necessary for the men to go under or near that lift.

(Testimony of Stanley Charles Davis.)

Q. In a general situation is—that the load, if the load is to be landed, or a plane landed on a deck——

A. Yes.

Q. There is no necessity for the men to go underneath that, they just come down and land the plane on the deck, is that right?

A. They have to steer it in position there too, because they will have the same thing if they are landing a plane on [618] the weather deck.

Q. But they steer it into position?

A. Into position if it is lowered to a point where they can get under it and walk it into the point where it would be landed.

Q. And when they steer loads into position they usually do it with their hands before them, pushing?

A. Not necessarily with their hands, they have to grasp it, because that plane might have to be pushed or pulled and you have to get a firm hold on it if they are going to secure it properly.

Q. When it is suspended from a cargo fall isn't it, it would take a very slight push?

A. That is the reason they have to have a se-
sure hold on it, not to push, but to hold it in case it would get away from them, to hold it back. And take a gust of wind, or the swinging of the ship, or even the boards which would cause it to head or boom could, because that plane, or that lift can swing in one way or the other, and in order to hold it securely they must have a secure grasp on the plane itself, on the strut or tripod or whatever object they can get a firm grasp on.

(Testimony of Stanley Charles Davis.)

Q. Have you ever seen them load jet planes?

A. Yes, sir.

Q. Do you know how wide the trailing edge of a jet plane [619] is?

A. No, that I do not. I have never paid any particular attention to the thickness, what it would be.

Q. Do you know whether or not it is so wide a man couldn't get a hold around it?

A. No, I don't think it is so wide he couldn't get his hands over the edge, that is, on the after end; the forward end, no, because the forward end is quite thick.

Q. The after edge there——

A. The aft edge is thinner, but just exactly how thin I wouldn't want to try to estimate.

Q. But to the best of your knowledge it is so thin that a man could grasp it with his hands, is that right?

A. He could grasp it, but he couldn't grasp enough to hold back on it, if he wanted to push, not to hold back, he couldn't grasp with what we would call a secure grasp.

Q. Well, the plane swings very freely, he could stop it from swaying, he could certainly hold onto it to keep it from swinging?

A. Not if he couldn't get a secure grasp, if he tried to hold on with the wing of the plane, didn't have a secure grasp why, it would just slide out from under his hand between his fingers.

Q. Do you know how wide a strongback is, Mr. Davis, generally speaking? [620]

(Testimony of Stanley Charles Davis.)

A. You mean the beam itself, the thickness?

Q. Yes.

A. The width, the—you mean the beams in the open hatch?

Q. Yes, the ones—

A. The hatch beams?

Q. The hatch beams?

A. They will vary from five to six and a half or seven inches.

Q. I see. Now Rule 820, Mr. Davis, provides:

“Employees shall never ride strongbacks or beams; nor shall they unnecessarily walk on or climb upon those in place.”

Is it safe to say that the reason they are not allowed to walk upon them is because they do not provide a safe footing? A. That's right.

Q. And you say between five and six inches wide?

A. That is right, they are spaced from four to five feet apart.

Q. Yes, and this rule in general would—

A. There are specifications in there, “When necessary,” and there are any number of occasions when it is necessary to walk out on a beam.

Q. On a strongback?

A. To hook on the bridle, they hook on the bridle when removing or placing— [621]

Q. Let me ask you this question, Mr. Davis. Let us assume that you were the gang boss of the stevedore gang loading cargo, or unloading cargo, and for some reason, which I cannot conceive of, but to con-

(Testimony of Stanley Charles Davis.)

form to your testimony, it became necessary to go out on a strongback to hold the bridle on. Could you give us such a situation?

A. Could I give you a situation? Yes, any number of them. The strongbacks are removed or placed by using what we call a strongback bridle at the end consisting of two wire lags, at the end, of what we call a toggle, a chain there at the end of the chain there is a cross bar. Those cross bars are inserted into holes in the sides of the beams, run through, and then pulled back so that the cross bar takes the weight of the beam. There are any number of instances where those holes in the beam are three or four feet out from the coaming that necessitates the man to get on the beam in order to either place or remove his strongback bridle.

Q. Would you say it was—you say you are very familiar with the safe practices in the safety code. Would you say it is a safe practice for a man to go out on a strongback to steady cargo as it came down?

A. They will not do that.

Q. They will not do that?

A. Because your strongbacks are removed before your cargo [622] is run into your hatch, and if it is necessary to load cargo into a deck or 'tween-deck, then the hatch covers are put on and you have a complete flooring.

Q. I see.

A. They never try to steady loads on a strongback.

(Testimony of Stanley Charles Davis.)

Q. They would not try to steady loads on a strongback? A. No, sir.

Q. A strongback is how wide? A. What?

Q. A strongback is how wide?

A. Run from five to seven inches.

Q. Do you know how wide those beams are?

A. Those beams on there are six inches, the fore and afts are six, I would say, six to seven inches, estimating the distance, and from what I have seen, and then your athwartship beams are your permanent beams, are around about ten inches.

Q. And those——

A. The fore and afts are your two beams in line with one another, gives you a little more space in the fore and aft than you would have on your athwartship.

Q. It is your testimony that a safe footing for the men would be at least four foot wide?

A. I said——

Mr. Kay: Just a moment. [623]

Q. (By Mr. Harrison): Is that correct, is that a correct interpretation of your testimony?

A. On a skeleton deck; I may add that in a skeleton deck you will have four feet.

Mr. Harrison: I think that is all.

Mr. Kay: I have no further questions.

Mr. Resner: No questions, your Honor.

Mr. Cooper: No questions.

(Witness excused.)

Mr. Kay: That is the impleaded respondent Jones Stevedoring Company's case, your Honor.

Mr. Cooper: If the Court please, there is no evidence in this case that requires putting on of any evidence by American Pacific Steamship.

Mr. Resner: We are willing at this time, your Honor, to dismiss, so far as the libelant is concerned, against American Pacific.

Mr. Cooper: If the Court please, if I understand counsel's statement, your Honor, I would say that the case having now been tried that we would ask that a judgment be entered in favor of the American Pacific Steamship Company and against the libelant and that we have an opportunity, of course, to present findings.

Mr. Resner: I don't think that is necessary if we dismiss it, your Honor, provides by a minute order the dismissal [624] be entered, they are out of the case. The only reason they were in here in the first place is because the contention by the Government that this was a dangerous place to work. As you know, I have taken the position, the Government having built the ship and having provided it would be responsible for any condition of that character. The evidence, of course, clearly shows the proximate cause and the reason for this accident to be the negligence of the Government's servants, and that being the case, and there being no showing by the United States here, and so far as unseaworthiness is concerned, the Government having seemed to abandon its position in that respect, we see no further reason to hold Mr. Cooper's client.

Mr. Cooper: If the Court please, there has never been any contention in this case by anybody, direct contention, that this mechano deck was unseaworthy and that Mr. Resner said at one time here in the case that the Government took that position, but the Government has never taken that position and neither has the impleaded Stevedore Jones taken that position. The result is there is nobody has taken the position that this mechano deck was unseaworthy, and we have denied it, so your Honor please, we insist on having a judgment which carries finding of fact. The effect in that, one of the things we will ask this Court to find that there is no evidence of unseaworthiness of the mechano deck of this [625] vessel, and that is why we are entitled to a judgment which carries findings of fact with it.

The Court: Submitted, gentlemen?

Mr. Resner: Yes, your Honor, submit it.

The Court: The only thing that is before the Court is the dismissal at this time. The motion will be granted.

Mr. Cooper: Still ask that we have findings of fact, your Honor. I ask that because there are other angles in this case which does not appear.

The Court: I can only determine what appears, I can't anticipate what the——

Mr. Cooper: I might say we are willing, if this makes any difference to counsel, we will waive costs as far as the libelants are concerned, that being the case.

Mr. Resner: That is not the point, Mr. Cooper.

The Court: Gentlemen, I have disposed of the motion; granted.

Mr. Resner: We have no rebuttal, your Honor; we rest. We are prepared to argue.

The Court: Proceed to argue, if you wish.

(Whereupon Mr. Resner presented argument to the Court.)

(Whereupon other counsel argued to the Court.)

[Endorsed]: Filed March 26, 1952. [626]

[Title of District Court and Cause.]

REPORTER'S PARTIAL TRANSCRIPT

April 10, 1952, at 2:00 P. M.

Mr. Resner: If your Honor please, we are at what I would call a hiatus.

The Court: I will level that out without difficulty.

Mr. Harrison: May I say something? When I left these gentlemen today we had agreed on findings. I had my girl type it as they found satisfactory. They agreed to them. I have them prepared.

The Court: Pass them along.

Mr. Harrison: They are submitted.

Mr. Resner: I don't agree with Mr. Harrison, Judge. May I be heard?

The Court: Certainly. First, tell me what findings you object to.

Mr. Resner: We go back to page 7, Judge, paragraphs 12 and 13. I object to the words, "which sum of money——"

The Court: Do you have his findings?

Mr. Harrison: Here are the ones we agreed to.

Mr. Resner: My objection is to the words, "is included as an item of damage."

If I may, Judge, I want to hand up the decree and findings we prepared for the libelant since we were the prevailing party. The difference between what Mr. Harrison has submitted and what I have submitted are the words, "and is [2*] included as an item of damage herein," and in paragraph 13 the last three lines.

I think that the Government is in a position where they can go into any court and assert any position they want to, and it is our position since we have submitted the findings, the burden will be upon us in the event of any appeal to support them. In other words, it seems to me that the danger that these findings may be in error that we, the libelant, have submitted is one of ours. And I assure your Honor that one, there is no desire on our part to prejudice the decree which your Honor has made; and, secondly, the Government still has the right to sue. What I don't want to have happen is for your Honor to determine or partially determine the issues which you say should be decided in another form.

The Court: I said that because when the mat-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ter was submitted, I repeat, I inquired whether or not a lump sum would be entered as a judgment. There was no protest.

Mr. Harrison: I beg your pardon, I protested strenuously.

The Court: Did he?

Mr. Resner: I don't recall that. He might have protested what ultimate decision your Honor reached, but how you did it——

Mr. Harrison (Interposing): I tried my best to outline in this case it would be necessary——

The Court: Maybe I am getting dull as the days go by, [3] but I don't think I am.

Mr. Harrison: I tried to outline loss of wages during the course of our argument, and all that. Your Honor told us it would be a lump sum, so of course I acquiesced.

Mr. Resner: I submit findings which are supported by the evidence. If there is anything wrong in that finding, the burden will be on us to assume. Secondly, we assure your Honor under the findings every right the Government has to sue is preserved, and my statement in the record to that effect seems to be adequate assurance.

The Court: Do you object to his finding No. 13?

Mr. Resner: Just the words in lines 19 and 20, Judge. After the word "date" I think there should be a period, after "date," and the rest of the sentence stricken, because I don't think your Honor has to decide that. Your Honor made a lump sum award. If you are going to say, for instance, "\$7,300 is medical," your Honor could have said,

“so much for wage loss,” too, and “so much for pain and suffering,” and your Honor didn’t do that. You said, “I will make a lump sum award.” This leaves it where the evidence will have to be gone to to support the findings and the verdict.

The Court: With that stricken, how does that preclude you from asserting your right?

Mr. Harrison: May I suggest Mr. Resner might tell us the real reason he wants it stricken. [4]

Mr. Resner: I have no objection.

The Court: I invite frankness here.

Mr. Resner: I was completely honest with your Honor. The compensation people carried Mr. Luehr to the sum of \$10,000. He has agreed to pay the \$10,000 back. Let’s assume the Government can prevail against the Firemen’s Fund and make the Firemen’s Fund pay back the \$10,000, is Firemen’s Fund then entitled to come back under the agreement with my client and get the \$10,000 again? I don’t want to subject my client to paying it twice.

The Court: That doesn’t impress me. You will be able to take care of your client after I sign this judgment.

Mr. Resner: I don’t think he should have to pay it twice. Secondly, I don’t think, if your Honor please, under the finding of a lump sum award your Honor wants to break it down.

The Court: I don’t.

Mr. Resner: We go to the evidence for that.

The Court: I don’t, because I ordered a lump sum.

Mr. Resner: That’s right.

The Court: Now, there are other issues entered into, that there is a finding, but I want to leave that in such a position that whoever wants to prevail or to assert their legal rights may do so.

Mr. Resner: That is in the findings between [5] the Government and Jones Stevedoring Company. They are submitting that in separate findings. That has nothing to do with the libellant in this case.

Mr. Harrison: Your Honor, Mr. Resner's only objection to those words, might submit his client to future suit by Firemen's Fund on some indemnity agreement that he has entered into with them, is entirely outside this lawsuit.

The Court: Yes.

Mr. Harrison: He just admitted if we prevail in our suit against Firemen's Fund, they then can turn around and sue his client, and consequently he wants that stricken. The reason is that so we won't prevail against Jones, so that Jones will not have the suit against his client. It is your Honor's duty to protect our rights.

The Court: I want to protect this client's rights, as well.

Mr. Harrison: However, an agreement entirely outside this case should not enter into it.

Mr. Resner: I agree, and I say the point he is raising is outside the issues, and what he says is not even pleaded by the pleadings.

The Court: Just a minute. I will straighten this matter out for you. "To date"—

Mr. Resner: "To date," period.

The Court: The other language is, "and that

said amount [6] is included as an item of damage herein." I didn't so conclude and I will strike that.

Mr. Harrison: Of course we will have to go along with that, your Honor, but it throws us out the window in our case against Jones.

The Court: Then out the window you go, brother.

Mr. Resner: And the same words, your Honor, in lines 5 and 6 after the word "carrier." Same page. And the words, "and is included as an item of damage herein" should be stricken.

The Court: So ordered.

Mr. Resner: Then the decree and the findings may be signed, your Honor? I think you have the findings there and the decree I have handed up to you.

Judge, may I direct your Honor's attention to what I think is an inadvertence: Lines 6 to 8. The last sentence is satisfactory. "It is true" to the word "right" we have agreed that is all right. Just the words should be stricken, "quote is included as an item of damage herein." The last sentence is satisfactory, your Honor. The last sentence of line 12, "It is true that libelant will be caused to incur expenses," and so forth. May I point that out to **your Honor?**

The Court: Yes.

Mr. Resner: (Indicating to the Court.)

The Court: I have that stricken. Since this is to be [7] appealed, you had better retype it.

Mr. Resner: We will substitute a typed page.

Mr. Kay: I have been following that, but that is going to the question of our findings, too, and I do

want to be heard on that, because I have gone into the record on that question of \$12,000.

Mr. Resner: I have agreed to strike the \$12,000.

Mr. Kay: Oh, yes, I apologize.

Mr. Resner: Mr. Kay, if you will let me, I will show you.

Mr. Kay: I apologize.

Mr. Resner: If we may withdraw it and have it retyped?

The Court: Go back to the Clerk's office and type it up. Next?

Mr. Kay: Your Honor, Mr. Harrison insists we made an agreement and now are withdrawing from it. We are because Mr. Harrison would not agree to Mr. Resner deleting from his findings this matter of \$12,000 for medical.

Mr. Harrison: That is not true. I did agree to it. I typed the page and it is deleted.

Mr. Kay: Let me finish the argument.

The Court: If you gentlemen ever get me excited, all of you will cool off.

Mr. Kay: The point is, your Honor, that there were certain matters that tentatively I thought had been agreed [8] upon with respect to Mr. Resner's findings. Mr. Resner came back and said, "No." In that case we couldn't go along because on the proposed findings of the Government there is incorporated this provision:

"And this Court finds and incorporates herein, and makes a part hereof, the finding of fact made and found in respect to the amended libel of libelant

as herein as though the same were set forth in full herein.”

Naturally, if we allowed the findings to go in on the basis of such proposed findings, we would be bound by it.

Mr. Harrison: Mr. Kay should see what is included in Mr. Resner's findings. We would not approve the \$12,000——

The Court: That is out.

Mr. Harrison: It was put out on the page——

Mr. Kay: This item, “Included as an item of damage”——

Mr. Harrison: May I show you, Mr. Kay, Mr. Resner's handwriting where he wrote in——

Mr. Kay: I don't care about that.

Mr. Harrison: ——the \$12,000 is out and I took it out.

Mr. Kay: That is one of the reasons. We have proposed and the findings again are substantially the same as the Government's, with the exception of the incorporation, and we have further incorporated the exact language of the Government in the proposed decree that we are asking your Honor to sign. [9] I want to read that.

The Court: The only difficulty I find myself in repeatedly, I am not as judicial as I should be or I wouldn't be listening to this thundering. That is the answer for trying to please everyone.

Mr. Kay: We have incorporated in our decree——and, after all, we take the same position Mr. Resner did with respect to the findings and conclusion and the decree. We say that is our responsibility, ac-

ording to law; and I have been practicing around here a long time, and I think we ought to be capable of judging what are proper findings.

We are proposing these findings ourselves now and taking full responsibility for them. In this decree, we have taken the language out of Mr. Harrison's proposed findings and conclusions of law:

"It is ordered, adjudged and decreed that respondent United States of America, a sovereign, take nothing from respondent-impleaded Jones Stevedoring Company on its petition to bring in third party under Rule 56, and that said petition to bring in third party under Rule 56 be and the same is hereby dismissed"——

And we have added, taken from the language of the Government's proposed findings,

"——reserving, however, the rights, if any, of the [10] United States of America to proceed against Jones Stevedoring Company for any amounts compensable under the Longshoremen's and Harbor Worker's Act, insurance policies herein referred to by reason of the waiver of subrogation agreement."

That is taken exactly out of their proposed findings and conclusions.

So that decree absolutely reserves any point they had to make, any effort to get something if they think they are entitled to it from Jones Stevedoring Company. He can't complain there.

We have the decree and have the findings based on the evidence. So, your Honor, we are going to submit our findings, our proposed findings and

conclusions of law, together with a final decree, copies of which have been served on the Government.

The Court: Where are yours?

Mr. Harrison: They are already in your hands, your Honor.

The Court: I will go over those and I will sign them so that you can go away and be assured that they will be signed.

Mr. Harrison: I appreciate the Court's courtesy in hearing it today and letting me get away.

The Court: That is why I exercised the patience I have. I will go into the findings and dispose of it. That is all.

[Endorsed]: Filed May 15, 1952. [11]

[Title of District Court and Cause.]

April 10th, 1952, 10:00 A.M.

The Clerk: Luehr vs. United States and Jones Stevedoring Company, settlement of findings.

Mr. Resner: Ready.

Mr. Harrison: Ready.

The Court: Proceed, gentlemen.

Mr. Harrison: I don't know exactly how your Honor would like to proceed. This is my motion for settlement of findings.

If the Court please, there are now four sets of findings before your Honor. Mr. Resner filed one

proposed set covering the case of Luehr vs. United States; Mr. Kay filed a set of findings covering the case of United States vs. Jones Stevedoring Company, and I have proposed counter-findings to both Mr. Resner and Mr. Kay.

Mr. Resner tells me the major point which I wish to change in his findings, he is agreeable to.

If your Honor please, it was my impression at the time of the trial that your Honor intended in his ruling to preserve to the United States the rights that we have that arise under the waiver of subrogation agreement. That matter was argued, and I think Mr. Kay asked for a decree in favor of Jones Stevedoring Company, and your Honor said that he would not make that, he would make a dismissal without prejudice to the right, our rights under the waiver of subrogation agreement. [2*]

As your Honor will recall, we argued during the course of the trial that the fact that the Jones Stevedoring Company has waived their right of subrogation with the United States enables us to recover from them the amounts payable by way of compensation to Mr. Luehr. I believe your Honor felt that that matter was not properly determinable here, and although I strenuously argued that we could dispose of it and eliminate a further suit against Jones, I believe your Honor felt the best way to do it was to grant a lump sum award in this case and preserve whatever rights the United States had against Jones on the waiver.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

I am not talking about the indemnity agreement with Jones Stevedoring Company. The "whole or in part," I am not talking about negligence at all. As I understand it, we lost on that point, and the findings which I have proposed would give us a definite order on that point that Jones was not guilty of contributory negligence and we were not entitled to indemnity under the contract. However, the findings which I have proposed would preserve to the United States their right to sue Jones for compensation payment.

Now, I believe that, perhaps inadvertently, the findings which Mr. Resner proposed would destroy that right insofar as the medical payments are concerned, and I believe Mr. Resner is now willing to concede his findings in that respect is in [3] error.

Mr. Resner: Mr. Harrison, maybe we can dispose of this. If your Honor will turn to page 7 of Mr. Harrison's findings, line 12.

Mr. Harrison: I have two sets. Let's get the right one.

Mr. Resner: Perhaps I could assist your Honor in pointing to the one directly, because there are four sets and it is a little confusing. Would you care to have me do that?

The Court: Surely.

Mr. Harrison: I proposed counter-findings to both Mr. Resner's findings and Mr. Kay's findings, so there are two sets.

The Court: What is the number of the finding you wish to direct my attention to? Finding No. 7?

Mr. Resner: Yes, your Honor. Those are the findings Mr. Harrison proposes in the case in chief, your Honor, in the case of Mr. Luehr against the Government. Would your Honor look at line 3 to 6:

“It is true that libelant has incurred medical expenses on account of said injuries to the date hereof in the amount of \$7,322.32, which has been paid by his employer’s compensation insurance carrier, and that said amount is included as an item of damage herein.” [4]

I want to put a period after the word “carrier,” and strike out “and is included as an item of damage herein,”

Throughout these findings as I was preparing them I was trying to bear in mind your Honor’s statement that you wanted to make a lump sum award. All the evidence is in the record before the Court, and your Honor felt that you didn’t want to break down the award item by item, so I feel the findings should reflect that attitude on your Honor’s part.

The Court: The only discussion on that was, I inquired whether you wanted the Court to make a lump sum award.

Mr. Resner: Yes, and we agreed you should.

The Court: There was no further discussion on it.

Mrs. Resner: You are absolutely right, Judge. One, after the word “carrier” there should be a period and the words Mr. Harrison proposes, “and is included as an item of damage herein” should be stricken.

Then in paragraph 13, which is the next paragraph, your Honor, lines 19 to 22.

“It is true that he could have earned——”

the libelant,——

“approximately the sum of \$7500 during the period from his injury to date, and that compensation has been paid by libelant’s employer”——

He means libelant’s employment compensation case——

“in the amount of \$3,082.20 to date.” [5]

I would want to strike out what Mr. Harrison says. It is my feeling what is damage and what isn’t damage is in the record, and you have made a lump sum award, and I don’t think at this time we should be breaking this down. You made a general finding, and therefore the findings in this regard should be general.

Mr. Harrison: If your Honor please, let me point out that Mr. Resner’s original proposed findings set out \$7,322.32 has been paid by his employer’s compensation insurance carrier, and he put in there, “which is not entitled to recoup same, and which sum of money is not an item of damage herein.” So I don’t think Mr. Resner’s comment about a lump sum——

Mr. Resner: Yes, we have that, Mr. Harrison. On reflection and thinking what the Judge said, I feel I made a mistake in that proposal, and I am saying I am in error and I am telling his Honor I feel the findings should conform to the statement

we agreed upon concerning the general award, and that would cause a few words to be stricken in paragraphs 12 and 13.

Mr. Harrison: If your Honor please, I don't see how it could possibly hurt Mr. Resner to have it say it is included as an item of damage, and it will clarify the case that the United States may have against the compensation carrier, because the only thing we are entitled to recover from them [6] are damages that have been recovered from us specifically. Therefore, the finding that this \$7,322. is an item of damage, specifically covered and specifically recovered against us, would give us the right to collect that specifically against Jones Stevedoring Company. I believe this would clarify the matter, simplifying any further litigation against Jones Stevedoring Company or their compensation carrier. It might even let us go in on a stipulation of facts.

The Court: What is your showing?

Mr. Kay: Your Honor, please, the findings that have been proposed by the Government, with just a few exceptions that we can point out shortly, are going to be agreeable to us and, with the exception of the exceptions discussed by Mr. Harrison and Mr. Resner, to the libelant. The Government's rights will be preserved, in any event, on this question of the subrogation right to the extent of whatever the carrier in this case had to pay up to the time that the notice of election to sue was filed.

Mr. Harrison: Just a second, Mr. Kay. It was

never filed in this case. That is exactly what I want to clarify.

Mr. Kay: Then up to the time the suit was filed. The minute libelant sued the third party, there was no longer any obligation on the part of the carrier to pay any further compensation. [7]

Up to that point what the Government is seeking in the way of recovering moneys paid that the carrier was liable to pay under the Longshoremen's Act, that is a matter of record. We should have no trouble stipulating to it. The Court wanted their rights to be preserved. Without regard to any findings other than what Mr. Harrison has proposed in these findings as to the impleaded petitioner, I think I can point out to your Honor on page 6—this was the findings proposed as to the impleaded petitioner, your Honor. The Government has proposed this finding, with which we are completely in accord, and which will preserve its rights. That is finding No. 11:

“The issue of whether or not Jones Stevedoring Company and/or Firemen's Fund Insurance Company must reimburse the United States for such portion of the liability herein occasioned by cost of medical attention past and future, although argued and presented, is not properly determinable in this action.” Then the following proposed findings:

“That the issue of whether or not Jones Stevedoring Company and/or Firemen's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the pro-

visions of the Longshoremen's and Harbor Workers' Act and [8] the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action."

We agree with those findings.

As to findings of "included," that leaves the Government with the reservation that your Honor had in mind in proceeding on any cause of action they feel they have against Firemen's Fund Insurance Company or Jones Stevedoring Company.

The Court: That will give everyone their day in Court.

Mr. Kay: That is correct, your Honor.

The Court: I agree with that.

Mr. Harrison: Those are the findings I have proposed, your Honor.

The Court: With some minor amendments.

Mr. Kay: If I may follow through on that, following those two findings Mr. Harrison has proposed the following. This is No. 13, page 7, on that same point we are referring to,—that is, on this impleaded petition. It reads as follows:

"That the amount of award herein attributable to cost of hospitalization amounts to \$7,322.32 covering cost to date, and \$12,000 covering cost of future expected medical expense."

We say that finding is improper and could not be made a finding in this proceeding for this reason: First, as I have indicated, their rights are preserved by the proposed [9] findings made before that. This question of how much the medical cost is, and how much future cost there is going to be, is immaterial

in reserving their rights because whatever they were at that time—incidentally, this \$7,322.32 does not represent the amount that was payable before suit was filed. This was the amount paid to them. That question of how much they got goes in a suit against the Jones Stevedoring Company and Firemen's Fund.

Also, this question of \$12,000 covering cost of future medical expense wouldn't be part of these proceedings at all, because the only thing they could possibly recover on their theory would be the amount of compensation and medical expenses paid to the time this libelant elected to sue a third party, namely, the Government.

Mr. Harrison. That is not our theory, your Honor. It is our theory we can recover all the amount payable, and that is the right I am seeking to preserve.

Mr. Kay: There is certainly a difference of opinion, then.

And the next, Article 14 is immaterial, we say, because under Title 33 the law provides in the event an injured workman is permanently partially disabled his maximum recovery may be \$11,000. That has nothing to do with the right of the Government to recover anything under that insurance clause. That is just a statement of the law. But the other provision, [10] Article 13, referred to \$12,000 for the costs. That is no part of their right to recover under their subrogation clause. So we say those two provisions should be deleted.

As to the rest of the proposed findings, we are

entirely in accord with the Government with the exception of one on page 8 which Mr. Harrison has agreed to. It merely clarifies the last conclusion, namely, Article 5, with reference to the provision in which it refers to the "Right to proceed against Jones Stevedoring Company for such amounts found to be compensable." That is line 20.

Mr. Harrison is agreeable to that.

Mr. Harrison: I realize what it will do to us, but may I say this: The findings which I have proposed do not prejudice Mr. Kay or Jones Stevedoring Company in any way should they prevail on their theory. If we should prevail on our theory, the deletions which Mr. Kay has suggested do seriously prejudice our theory of the matter.

I think all the findings I have proposed were properly introduced in evidence here. They were all matters discussed. The matter of future hospitalization was one of the items placed on the board here, and I assume your Honor went along with it. There was no evidence to the contrary.

All the items which I have proposed—I assure your Honor I am not trying to mislead the Court in any way. I am merely trying to protect our rights under our theory. [11]

May I say this: When I argued our theory of the case Mr. Resner complimented me frequently by saying I should return to law school. Two days after the trial was over the District Court in Pennsylvania—Circuit Court in Pennsylvania went along with the suggestions which I was making to your Honor and reduced the award against the United

States by the amounts of the compensation paid. As I understand your Honor's ruling, in this case you were not willing to do this at this time. I would like that, if possible, we could still dispose of this possible litigation against Jones Stevedoring Company by reducing the \$125,000 by the amounts we feel we can recover against Jones. That is exactly what the Circuit Court of Pennsylvania did in *Ballardi vs. United States*, which appears in the new 1952 A.M.C.

The Court: That is a phase of the case I was in doubt about.

Mr. Kay: While he was looking at that, that case involved and there was a finding of joint negligence, and the Court had in mind that in that case it would be fair and equitable to so find.

Mr. Harrison: If your Honor please, joint negligence is an entirely different matter. This case, in the findings in damages, they are credited to the findings against the United States the amounts payable by way of compensation.

The Court: Let me give you my thought on this matter. [12] I want to sustain a judgment against the Government in relation to this \$125,000.

Mr. Harrison: The findings which I have proposed do that, your Honor.

The Court: Now then, the other issue between you and the carrier, I am willing to give you the opportunity of having your day in court on that. Now, get together and prepare findings accordingly. That is my present state of mind and has been my state of mind all during this case. I want to give

everybody an opportunity to have their day in court.

Mr. Resner: That is the big problem. We both feel the findings we have proposed do that. What it amounts to, I suppose, is that we are jockeying, for what we conceive to be legal positions.

The Court: If everyone is acting in good faith, they will have their day in court.

Mr. Resner: That is true.

Mr. Harrison: May I say this: The findings I have proposed would enable us to proceed on our theory. If Mr. Kay prevailed on his theory, the findings would not prejudice him one bit. I think Mr. Kay, if he is so confident of his theory, could agree these are all right. They do not prejudice you.

Mr. Kay: In very simple language we can substitute for the findings I object to here sufficient language to completely [13] and without any question reserve to the Government its right to proceed on the theory that it has some recovery under, or some cause of action under the subrogation.

The Court: You haven't persuaded him.

Mr. Kay: Apparently I haven't here.

Mr. Harrison: That isn't the point. Admittedly we have a right, but only under Mr. Kay's theory, and we have another theory and he is trying to eliminate that.

The Court: I will say frankly you both may have your theory of the case and I don't want to interfere with it.

Mr. Kay: My suggestion will give them complete freedom to urge any theory.

Mr. Harrison: That is not our theory.

Mr. Kay: It will for this reason—I will try to be brief—when they propose a finding here that a certain amount has been recovered for future medical expenses, and that under the Longshoremen's Act it is provided that there is a maximum of \$11,000 recoverable by the injured employee for permanent partial disability, those are facts that cannot be altered by any situation. First of all, the law is the law. I say that that particular provision is immaterial here. If it has to be in to satisfy Mr. Harrison, I will be frank to say I don't think it can do us any harm. It just hasn't any place in the findings.

The Court: If it doesn't do you any harm, I am prepared [14] to sign it.

Mr. Kay: Very well. That is No. 14. As to No. 13, your Honor, this refers to the amount attributable to the hospitalization and future expected medical expense. This would represent a finding on a certain issue. As to the \$12,000 for the medical expenses, there has been no finding on that. There has been no evidence, really, as to any such finding, and I think that would be improper.

Mr. Harrison: Would that do you any harm, Mr. Kay?

Mr. Kay: Because it is improperly in here, yes, as an opinion of the Court wouldn't ever justify a finding that isn't properly in the case.

Mr. Harrison: It would merely mean we would have to try the case on damages again.

Mr. Kay: I assure you that isn't so. If they file a complaint against the Firemen's Fund Insurance Company, they are going to allege a certain amount of hospital and medical expense and compensation has been paid by the Firemen's Fund.

Mr. Harrison: Is payable by Firemen's Fund.

Mr. Kay: That is still a matter they could allege and prove.

Mr. Resner: There wasn't evidence on that question.

Mr. Kay: They put a statement on the board, your Honor.

Mr. Resner: What Mr. Harrison is confusing is this: Once Mr. Luehr decided to go against the third party, all his [15] testimony became wrapped up in the lawsuit which your Honor heard, and future medical and future compensation were substituted as against the Firemen's Fund and the United States became liable for it.

Mr. Harrison's theory is that under their anti-subrogation agreement they can get back the maximum they might have to pay had Mr. Luehr not sued, but that is not the theory of the third party. If Mr. Harrison can prevail on that theory, it seems to me all he has to do is file a complaint against that Firemen's Fund and plead it.

Mr. Harrison: The findings I have proposed won't do them any harm.

Mr. Kay: It just isn't proper. I can think of findings that wouldn't harm Mr. Harrison, but it isn't proper. That contract is between an entirely different party. Firemen's Fund Insurance Com-

pany made a contract with the Government that under certain conditions Firemen's Fund couldn't subrogate against the Government. Whether or not a payment of compensation here and any recovery back of that is indirectly violating that agreement is a matter for another suit against the Government and Firemen's Fund.

Again, the \$12,000 alleged herein as future medical was never found herein. There is no evidence on that.

Mr. Resner: Oh, there is evidence.

Mr. Kay: We would be entitled to litigate that part if [16] they have a right to recover for future medical, which I say they don't have.

Mr. Harrison: They had the opportunity to litigate it here, and that is exactly what Mr. Kay overlooked.

Mr. Kay: At no time have we avoided that issue. We are willing to submit it, your Honor.

Mr. Resner: I think your Honor understands the problem. I think we should submit it.

The Court: I want to dispose of it. Counsel wants to get away.

Mr. Resner: As far as the findings, the litigant's concern is simple. I just want to strike from paragraph 12, page 7, "And is included as an item of damage herein." That leaves a finding that this money was paid by the carrier. If they are entitled to get it back, that is their lookout.

Then I want stricken from line 22, "Said amount is included as an item of damage herein," and leave that that \$7,322.32 was paid. If the Government has

a right to get it back, all they have to do is assert it in another lawsuit. Your Honor made a lump sum award, without specifying just what was a particular item of damage, leaving the evidence to support the particular finding.

Mr. Harrison: May I say there was no intention not to include these as items of damage. [17]

Mr. Resner: That is right. There is no question—

Mr. Harrison: Then there is no reason it shouldn't be in the findings.

Mr. Resner: Only that his Honor made a general decree.

Mr. Kay: Your Honor, I think this should solve this problem insofar as Mr. Harrison is concerned, and I think in connection with Mr. Resner's findings. We will now further agree to this finding to be substituted at page 7, Article 12, to which I objected to the whole article. I would be willing now, if this will facilitate this situation so we can get these findings signed, to agree in the findings that the amount of \$7,322.32 had been paid by the compensation carrier, and eliminate this question of \$12,000 for future medical.

Now, if they have a suit here and they can show any future medical that has to be paid, I don't see the point because the carrier is no longer liable to pay any future medical. This recovery of \$125,000 eliminates any future liability for medical, so there is no necessity to have it in here.

The Court: Prepare your findings accordingly.

Everybody will have their day in court. Do that this morning. Retire and do it.

Mr. Harrison: I don't think we are going to be able to reach an agreement on this, because that would blast the [18] Government's theory. My findings preserve our rights to the minimum. It doesn't impose or impinge upon any right of Jones Stevedoring Company. The only thing I can do is submit the findings I have.

The Court: What I am trying to do is dispose of the matter at hand. I made a finding in respect to your client——

Mr. Resner: Yes, Judge.

The Court: ——for \$125,000. Now this other situation has arisen, and I think it was generally known, discussed superficially. I want you to have your day in court in relation to that. That is all.

Mr. Harrison: I submit our findings would not harm anybody else at all. If they prevailed on their theory——

Mr. Kay: Just a final word: What Mr. Harrison is trying to do is get a finding that would bind Firemen's Fund in a suit against them. They were not a——

Mr. Harrison: That is not true. Our theory is Jones Stevedoring Company is liable for this just as much as the Firemen's Fund Insurance Company. Maybe Mr. Kay doesn't agree.

The Court: All right, you are still going to sue Firemen's Fund?

Mr. Harrison: We are going to sue both of them.

Mr. Kay: All right, Firemen's Fund will be a

party. He is trying to get a finding he would try to use against [19] Firemen's Fund. He would have to establish that whatever the facts are here as found in these findings are in accordance with the evidence. We have agreed with everything that is proposed as findings with the exception of this \$12,000 item which is not properly there.

Mr. Resner: And the \$11,000 future.

Mr. Kay: Yes. I don't care about that. That is a statement of law. We will agree the law says an injured longshoreman may recover \$11,000 if there is no third party suit. That is clear. We have agreed to everything they have proposed, except this one item which is not properly a finding.

The Court: Eliminate it, gentlemen. Eliminate it.

Mr. Resner: All right. Then these findings I have been talking about, Mr. Harrison, are acceptable. I will write them any way your Honor wants to.

Mr. Harrison: Just a minute. I didn't consent to any change in the findings.

Mr. Resner: I am telling the Judge if he wants to leave in the words, "And included as an item of damage herein," if he wants them in, we will leave them in. That is what it comes down to, whether it should leave in the words, "Is included as an item of damage herein."

Mr. Kay: If I understood his Honor, he said to eliminate that. Am I correct?

The Court: If that doesn't preclude the issue being [20] tried.

Mr. Kay: It does not, your Honor.

Mr. Harrison: It does. It definitely does. If it doesn't say that is included as an item of damage herein, we have no suit.

The Court: I can't follow you.

Mr. Harrison: In that \$125,000 I am sure your Honor intended to include all the medical expenses, both past and future.

The Court: I am not prepared to say that.

Mr. Harrison: The \$125,000, then, is over and above——

The Court: Not necessarily. I tried to indicate to you—this matter was discussed and I made an inquiry, "Do you want a lump sum judgment in this case"? And that was limited to the client. This other controversy that raised up, that will have to be litigated.

Mr. Harrison: I agree, but we are discussing a finding in Mr. Luehr's case, and the \$125,000 includes all Mr. Luehr's items of damages, does it not? There is nothing more coming?

Mr. Resner: We don't say that. All we say is the judge made a general award and preserved to you, Mr. Harrison, your right to litigate out any right you may have to recover. Isn't that correct? That is what the judge said. He said he would make a lump sum award and preserve to you without [21] prejudice.

Mr. Harrison: This is pure fakiness, trying to avoid the effects of the Baraty case which I just cited.

The Court: I am glad we are getting along so well.

Mr. Harrison: This particular collaboration between the parties has been going on through the entire trial, and they are attempting to perpetuate what they have worked out between themselves.

The Court: I want to pay you a compliment on your interest in behalf of the Government. I will not discourage it. That is the reason I left this issue so that you might, no matter who may prevail, have an opportunity to have your day in court, and that is the only interest I have.

Mr. Harrison: That is exactly what I am trying to preserve. I submit the findings I proposed and Mr. Resner's are the only way we can preserve it.

The Court: I have a case on trial now, gentlemen. I am not going to give you any more time.

Mr. Kay: If we may take the findings that have been filed with your Honor, perhaps we can put them in a shape that your Honor will sign them this morning.

Mr. Harrison: I am afraid I am not going to make any concessions. I have prepared the best findings I can.

The Court: That is all right. I don't want you to make any concessions. But I am prepared to sign the amended [22] findings along the line I have indicated.

Mr. Kay: Would your Honor prefer we come in this afternoon and present them?

The Court: I will be here all day.

Mr. Kay: Would two o'clock be all right?

The Court: Two o'clock.

(Thereupon an adjournment was taken until two o'clock p.m. this date.)

[Endorsed]: Filed May 15, 1952. [23]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court or true copies of orders entered in the above-entitled case and that they constitute the record on appeal herein, designated by the parties thereto:

Answer.

Petition to Bring in Third Party Under Rule 56.

Answer to Petition and Libel.

Minute ord. of Dec. 4, 1951, denying motion for continuance of trial date.

Minute order of Dec. 7, 1951, denying exceptions of Jones Stevedoring Co. to Petition and Libel.

Motion to Add American Pacific Steamship Co. as Party Respondent.

Order Adding American Pacific Steamship Co. as Party Respondent.

Amended Libel in Personam for Damages.

Minutes of Trial—March 17, 1952.

Minutes of Trial and order denying libelant's motion to dismiss as to American Pacific Steamship Co., without prejudice—March 18.

Minutes of Trial—March 19, 1952.

Minutes of Trial—March 20, 1952.

Minutes of Trial—March 21, 1952.

Minutes of Trial and order granting libelant's motion to dismiss as to American Pacific Steamship Co.—March 24, 1952.

Minutes of Trial, including dismissal as to Jones Stevedoring Co. and judgment for libelant.

Findings of Fact and Conclusions of Law submitted on behalf of libelant.

Minute order settling findings of fact and conclusions of law—April 10, 1952.

Findings of Fact and Conclusions of Law as submitted by Jones Stevedoring Co., Respondent-Impleaded.

Findings of Fact and Conclusions of Law.

Final Decree (Jones Stevedoring Co.).

Final Decree (Libelant).

Notice of Appeal.

Order Allowing Appeal.

Citation on Appeal.

Order Extending Time to Docket.

Assignment of Errors.

Respondent United States of America's Designation of Apostles on Appeal and Praeceptum Therefor.

Libelant's Additional Designation of Apostles on Appeal and Praeceptum Therefor.

United States Court of Appeals
for the Ninth Circuit

No. 13,562

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR,

Appellee,

and

JONES SSTEVEDORING COMPANY, a Corpora-
tion,

Appellee.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED ON ON APPEAL AND DESIG-
NATION OF PORTION OF RECORD TO
BE PRINTED

Appellant adopts as points on appeal the Assign-
ment of Errors included in the Apostles on Appeal
on file herein.

Appellant designates for printing the entire
Apostles on Appeal as designated by the appellant
on file herein except that by stipulation on file
herein the exhibits with the exception of Govern-
ment's Exhibit (C) and Government's Exhibit (D)
need not be printed and may be considered by the
Court in their original form.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ KEITH R. FERGUSON,
Special Assistant to the Attor-
ney General,

/s/ J. STEWART HARRISON,
Attorney, Dept. of Justice,
Proctors for Appellant.

[Endorsed]: Filed October 16, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between appellant and both appellees, acting by and through their respective proctors, that in order to save further cost of printing, all exhibits heretofore admitted in evidence herein, except appellant United States of America's Exhibits (C) and (D), need not be printed, and that the same may be considered in their original form.

It is further stipulated and agreed that appellant United States of America's Exhibit (A) being the Pacific Coast Marine Safety Code which is in booklet form, need not be printed, but that additional copies of said booklet will be furnished the Court by appellant.

And it is further stipulated that appellant's Exhibit (B) being a contract between appellant and appellee, Jones Stevedoring Company, need not be printed and that the pertinent portion thereof appearing in the appellant's Petition to Implead a

Third Party, and Jones Stevedoring Company's Answer to Said Petition are true and correct excerpt from said Exhibit (B) and may be considered by the Court as excerpts therefrom in order to avoid duplication of printing.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General,

/s/ J. STEWART HARRISON,
Attorney, Dept. of Justice,

Proctors for Appellant, United States of America.

JOHN BLACK, and

EDWARD R. KAY,

/s/ JOHN H. BLACK,

By /s/ EDWARD R. KAY,

Proctors for Appellee, Jones Stevedoring Company.

HERBERT RESNER, and

RAOUL D. MAGANA,

By /s/ HERBERT RESNER and

/s/ RAOUL D. MAGANA,

Proctors for Appellee, Frank Luehr.

So ordered:

/s/ WILLIAM DENMAN,
Judge, U. S. Court of Appeals.

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,
Judges, U. S. Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: Filed October 17, 1952.